TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 95

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

vs.

GEORGE A. STORRS, JOSEPH S. WELCH, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH

FILED MAY 1, 1926

(31,109)

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INDEX

[Caption omitted.]

1 In United States District Court, District of Utah

No. 8489, Criminal

UNITED STATES OF AMERICA, PLAINTIFF

vs.

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. WELCH, AND CHARLES M. CROFT, defendants

Indictment

Filed Oct. 31, 1924

No. 8489, Criminal

United States of America, District of Utah, Central Division

2 *In the name and by the authority of the United States of America:*

In the District Court of the United States of America, within and for the Central Division of the District of Utah, in the Eighth Judicial Circuit.

The grand jurors of the United States of America, drawn from the territory comprising the Northern and Central Divisions of the District of Utah, and sitting in the Central Division of said district at an adjourned session of the term beginning the fourteenth day of April, A. D. 1924, being first duly impaneled, sworn, and charged by said court to inquire of and concerning the crimes and offenses within and for said District of Utah, upon their oaths do present and charge:

First count

That one George A. Storrs, and one Jos. S. Welch, and one Earl J. Welch, and one Charles M. Croft, hereafter in this indictment called defendants, continuously thruout the period of time from about the fifteenth day of November, 1919, to the fifteenth day of March, 1923, at Salt Lake City, in Salt Lake County, in the State and Central Division of the District of Utah, and within the jurisdiction of this court, knowingly, wilfully, unlawfully, and feloniously, have conspired, combined, confederated, and agreed together, and each with the other, and with divers persons to the grand jurors aforesaid unknown, to commit an offense against the United States of America, to wit, to violate section 215 of the Federal Penal Code of 1910, being an act of Congress approved March 4, 1909 (35 Stat. 1088), that is to say:

That the said defendants then and there and continuously thruout the said period of time from about the said 15th day of
3 November, 1919, to the said 15th day of March, 1923, unlawfully, knowingly, wilfully, corruptly, and feloniously have conspired, combined, confederated, and agreed together, and each with the other, and with divers other persons to the grand jurors aforesaid unknown, in unlawfully, knowingly, wilfully, and feloniously devising and intending to devise a scheme and artifice to defraud all such persons thruout the State of Utah who could or might be induced, by means of the fraudulent and false devises, artifices, representations, pretenses, and promises hereinafter mentioned, to invest various sums of money and other valuable property, as loans to, or as the purchase price of bonds, or of town-site lots, of a corporation to be organized, and which was thereafter organized and known as Great Western Coal Mines Company, either directly or as a result of solicitation on the part of said defendants, or the agents, representatives, and associates of said defendants, and to obtain from said persons who might be induced as aforesaid, by means of said false and fraudulent representations, devises, pretenses, and promises, said sums of money and other valuable property, which said sums of money and other valuable property said defendants would apply, in whole or in part, to their own use and gain; and, for the purpose of executing said scheme and artifice to defraud and in attempting so to do, to place and cause to be placed in the post office of the United States at Salt Lake City aforesaid, to be sent and delivered by the post-office establishment of the United States, certain letters, prospectuses, writings, and advertisements, in violation of said section 215 of the said penal code.

That said scheme and artifice to defraud so to be devised
4 and intended to be devised as aforesaid, and which was in fact devised in pursuance of said unlawful agreement and conspiracy, was in substance and in effect as follows, that is to say:

It was the intent, object, and purpose of the said defendants to organize, or cause to be organized, under the laws of the State of Utah, a certain corporation, which corporation should be formed and organized for the pretended purpose of carrying on coal mining operations in Carbon County, State and District of Utah, for the pretended benefit and profit of the persons to be defrauded, who should and did invest money and other valuable property in said corporation; that said corporation so to be organized was in fact not to be organized in good faith for the carrying on of coal mining operations in Carbon County, State and District of Utah, or in any other place, for the benefit and profit of said persons to be defrauded, who should and did invest sums of money and other valuable property in said corporation, but was to be and was thereafter organized for the personal benefit, profit, and financial gain of the said defendants, and to induce and persuade the said persons to be defrauded to pay and send their money and other valuable property to the defendants, under their own names, and under the name of defendants

as "fiscal agents" and under the name of the Great Western Coal Mines and Great Western Coal Mines Company; and to induce and persuade the said persons to be defrauded to pay and send their money and property as aforesaid, it was the intent and object of said defendants by word of mouth and by means of letters, pro-pectuses newspaper articles, maps, and plats, to make, and the defendants did make, either directly or through agents, representatives, and associates of said defendants, false and fraudulent pretenses, repre-
5 sentations and promises to the persons to be defrauded, concerning the purpose, object, organization, stability, financial condition, property holdings, and coal-land holdings of said corporation, and the nature, extent, and value of coal deposits and coal lands which the defendants should and did, at the time such false and fraudulent pretenses, representations, and promises were to be made and were made, claim said corporation to be organized as aforesaid, would and did own and control, and concerning the opportunity offered persons investing money and other valuable property in said corporation to make large financial gains and profits.

That as part of said scheme and artifice the said defendants did, on or about the 21st day of October, 1921, organize and cause to be organized, under the laws of the State of Utah, a certain corporation, to wit, Great Western Coal Mines Company.

That among the false and fraudulent pretenses, representations, and promises so to be made, and so made, by the said defendants, the falsity of which the said defendants, and each of them, at all times well knew, were particularly the following:

1. That the property holdings to be acquired, and which were acquired by the said Great Western Coal Mines Company, from a certain corporation, namely, Cedar Mesa Farm, Inc., included extensive and valuable deposits of coal, and a large acreage of coal lands, containing between 800 and 1,800 acres, in Carbon County, State of Utah, which said deposits and coal lands the said Cedar Mesa Farm, Inc., owned and controlled; whereas, in truth and in fact, the said Cedar Mesa Farm, Inc., did not at any time own or control, or have any valid interest in or title to, any coal deposits or coal lands, except about nine (9) acres of coal lands, either
6 in Carbon County, State of Utah, elsewhere, and the said Great Western Coal Mines Company did not acquire from the Cedar Mesa Farm, Inc., or from any other corporation or person, throughout the period of time hereinbefore alleged, any coal deposits or coal lands, or any valid interest in or title thereto, except about nine (9) acres of coal lands.

2. That the money and other valuable property advanced, paid, and sent by persons to invest in said corporation was used and to be used in getting the property to be acquired, and which was acquired by the said Great Western Coal Mines Company, in shape for a first-mortgage bond issue of $600,000.00, and to construct a railroad to certain coal properties adjoining and including the holdings of the said Cedar Mesa Farm, Inc., and to develop coal properties

claimed by the defendants to have been acquired by or which were then under the control of the said Great Western Coal Mines Company; whereas, in truth and in fact, no part of said money or other valuable property advanced, paid, or sent by persons induced to invest in said corporation was used in the development of any coal property or properties at all, nor to construct the said railroad, except a very small part thereof, nor in getting said property in shape for the issuance of first-mortgage bonds to the amount of $600,000.00, or any other amount; but, on the contrary, the said money and other valuable property so advanced, paid, and sent as aforesaid was used and kept, either in whole or in large part, by the said defendants and their agents and representatives as commissions and for the payment of their personal debts and obligations.

4. That the bonds issued by said Great Western Coal Mines Company were to be, and in fact were, first-mortgage bonds;
7 whereas, in truth and in fact, said bonds were not first-mortgage bonds, said bonds being only secured by property upon which there were then, and at all times thereafter up to the present time, certain existing and valid prior mortgages, liens, and incumbrances in large amounts.

4. That the said Great Western Coal Mines Company should be shipping coal for the 1922 season; whereas, in truth and in fact, no coal has ever been shipped at all by the said Great Western Coal Mines Company up to the time of the returning of this indictment, and the said defendants never intended that shipment should or could be made of coal by the said Great Western Coal Mines Company for the said 1922 season.

That said defendants and each of them, thruout the period of time hereinbefore alleged, well knew of the falsity and fraudulent and misleading character of said representations, claims, promises, and pretenses, and of the falsity and fraudulent character and purpose of said artifice and scheme and device; and that all and singular of the false and fraudulent statements, representations, pretenses, and promises hereinbefore set forth would be and were intended by said defendants, and each of them, to be made and done, for the fraudulent purpose on the part of the said defendants and each of them, to deceive the said persons so to be defrauded, and fraudulently to induce said persons and each of them to advance, pay, and send sums of money and other valuable property to said defendants, their agents and representatives, or to said Cedar Mesa Farm, Inc., or said Great Western Coal Mines Company, as loans to said Great Western Coal Mines Company, or as the purchase price for pretended first-mortgage bonds, or town-site lots of said
8 Great Western Coal Mines Company, and to cheat and defraud said persons so to be defrauded as aforesaid, with the intent then and there on the part of said defendants and each of them to convert said sums of money and other valuable property so fraudulently obtained as aforesaid, either in whole or in part, to the

use, gain, and benefit of the said defendants and each of them, and of said other persons to the grand jurors aforesaid unknown, with whom said defendants conspired as aforesaid.

That said conspiracy of said defendants was continuous in nature and in purpose and was continuously in existence and in process of execution by said defendants thruout all of the period of time hereinbefore alleged.

That on or about the 22nd day of March, 1921, according to and in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and during the existence of said unlawful conspiracy, and to effect the object of the same, and for the purpose of executing and bringing about the accomplishment and completion of said scheme and artifice to defraud and attempting so to do, the said Earl J. Welch, at Salt Lake City aforesaid, did knowingly, wilfully, unlawfully, and feloniously place and cause to be placed in the post office of the United States at Salt Lake City, in the State and central division of the district of Utah aforesaid, to be sent and delivered by the post office establishment of the United States a certain letter enclosed in an envelope, postage prepaid, and addressed to Mr. Geo. Rasmusson, Provo, Utah, R. D. No. 2, Box 211, and which said letter was then and there of the tenor following, to wit:

9 Great Western Coal Mines. General offices 208 Newhouse Building. Telephone Wasatch 2610. Mines, Carbon County, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft

SALT LAKE CITY, UTAH, *March 22, 1921.*

Mr. GEO. RASMUSSEN,
Provo, Utah, R. D. No. 2, Box 211.

DEAR SIR: On the date of December 14th, 1920, you subscribed to the Great Western Coal Mines loan, in the sum of $500.00, at which time you received from our authorized representatives a receipt for the amount of your loan.

We are enclosing you herewith the companys' certificate of guarantee, which is an additional safeguard to your interest.

Since your subscription was taken this company has fortified the soundness of your loan to the extent that we have arranged a bond or guarantee for your protection, and this is to be held *by* you until the organization of our company, at which time you will receive a regular stock certificate.

You will be interested to know we have heard that on the property of the National Fuel Company, which adjoins that of the Great Western on the north, there has been an additional sum of $50,000.00 invested, and it is understood that up to date there has been $200,000.00 put into this company.

The Great Western Coal Mines own and control what we firmly believe to be one of the greatest deposits of undeveloped coal lands

in the entire West. We are located in the heart of the Carbon County district, directly in the center of production.

10 As our representative told you at the time you gave him your order, that we were raising an initial sum of $75,000.00 and the offer that we made you and are still making was three shares for every dollar invested for the use of your money, together with a guarantee that your investment will be returned to you upon the completion of the financing of our company.

We thank you for the confidence you have placed in our organization to the extent that your loan, and for that reason we extend an opportunity to you so that you may increase your loan to any amount that you so desire.

Owing to the fact that you were one of the first to join hands with us, we feel duty bound to grant the privilege of an additional loan to you.

The merits of our liberal offer, together with the soundness of this security, are causing the unsold portion of $75,000.00 to be rapidly absorbed by the most conservative investor. Therefore, if you desire to take advantage of our extended opportunity to you, it is necessary that you send us your check and subscription at once.

By your subscription to this loan you are not only fortifying your financial future by making a rock-ribbed investment, but you are also making it possible for this concern to get into the field of the actual producers in less time than it would otherwise take.

The president of the company, Mr. George A. Storrs, wrote a letter to one of his personal friends and made the following statements: That he had $127,000.00 invested in this property and

11 further that he would rather lose all of it than to have any misrepresentation made in order to raise the necessary amount required to complete the financing of this organization. If it was good enough for Mr. Storrs to put his fortune into, that in itself is a sufficient reason why you or anyone else who have a few hundred dollars lying idle should put it into this loan.

Put your surplus savings to work with us, as we guarantee the safety of your investment, together with three shares of our stock as a bonus.

Again thanking you for the confidence you have placed in us, and trusting that we may have the pleasure of knowing you personally in the very near future, we are

Most sincerely yours,

GREAT WESTERN COAL MINES CO.,
EJW MU E. R. WELCH.

P. S. If there is anything about your investment that you do not thoroughly understand, a telephone call to Was. 2610, or a post-card, will immediately bring an explanation.

They, the said defendants, then and there well knowing the said letter to be of and concerning said scheme and artifice to defraud, and for the purpose of executing the same and attempting to execute

the same and to effect the object and purpose of said unlawful conspiracy aforesaid.

That thereafter, to wit, on or about the 19th day of April, 1921, according to and in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and during the
12 existence of said unlawful conspiracy, and to effect the object of the same, and for the purpose of executing and bringing about the accomplishment and completion of the aforesaid scheme and artifice to defraud and attempting so to do, the said Earl J. Welch, at Salt Lake City, aforesaid, did knowingly, wilfully, unlawfully, and feloniously place and cause to be placed in the post office of the United States at Salt Lake City, in the State and central division of the district of Utah aforesaid, to be sent and delivered by the Post Office Establishment of the United States a certain letter and prospectus, enclosed in an envelope, postage prepaid, and addressed to Mr. A. L. Welliver, c/o. Dempsey Hotel, Davenport, Iowa (said prospectus being too voluminous to be set forth herein), and which said letter was then and there of the tenor following, to wit:

Great Western Coal Mines. General offices, 208 Newhouse Building. Telephone Wasatch 2616. Mines, Carbon County, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft.

SALT LAKE CITY, UTAH. *April 19, 1921.*

MR. A. L. WELLIVER,
c/o. Dempsey Hotel, Davenport, Iowa.

DEAR SIR: Under separate cover I am mailing some prospectuses, letters of reference on Mr. George A. Storrs, and a general statement regarding the proposition of the Great Western Coal Mines.

Your wife called this office and stated that probably you will be in
13 a position to raise some money in that part of the country. We will be pleased to have you do this, and there is no question in my mind but that you will be doing your friends a favor by letting them in on this kind of a deal.

Money is loosening up a little here, and it will only be a short time until we have the $75,000.00 subscription.

I believe this is the best proposition we will ever have to offer during the development of the Great Western Coal Mines, and very seldom is a deal of this kind ever offered to the public. People coming in at the present time get in even on a better basis than the basis on which Mr. George A. Storrs and partners came in on. They spent their hard earning cash and a lifetime earnings in this property, and they receive no dividend until the development of this property and its success attained.

Those coming in at the present time have their money returned from the first sale of bonds, which simply means that they are going to be out the principle for a few months time; their stock will then

have cost them the interest on their investment during the time it takes us to finish this $75,000.00 subscription and the sale of that many dollars' worth of bonds.

You have gone in this deal thoroughly and should understand it, and I believe you are in a position to properly explain it to your friends. We wish you much success on your trip and hope that you will be able to do some business for us.

We will take care of you on your commission the day your business is turned in. By the time you return we are apt to be working on the development of the mine itself.

Two of our salesmen just returned from Price, and they tell me that preparations are being made for the building of this rail-
14 road, and there is no question in my mind but that it will be completed this fall, and carrying coal from both the Great Western Coal Mines and the National Fuel; in fact, this statement can be substantiated by one of the county commissioners at Price.

This should help to make you feel better in the investment you made.

Hoping that you will be able to do some business for us and thanking you for the assistance given thus far. We are

Very respectfully yours,

GREAT WESTERN COAL MINES,
E. J. WELCH.

EJW MU

P. S. We will pay you 15 per cent commission on all business that you do.

They, the said defendants, well knowing that the said letter and prospectus to be of and concerning said scheme and artifice to defraud, and for the purpose of executing the same and attempting so to do, and to effect the object of the said unlawful conspiracy aforesaid.

That thereafter, to wit, on or about the 27th day of April, 1921, according to and in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and during the existence of said unlawful conspiracy, and to effect the object of the same, and for the purpose of executing and bringing about the accomplishment and completion of the aforesaid scheme and artifice to defraud and attempting so to do, the said Earl J. Welch, at Salt Lake City, aforesaid, did knowingly, wilfully, unlawfully, and feloniously place and cause to be placed in the post office
15 of the United States at Salt Lake City, in the State and Central Division of the District of Utah, aforesaid, to be sent and delivered by the post office establishment of the United States a certain letter, enclosed in an envelope, postage prepaid, and addressed to Mrs. D. M. Gray, % County Infirmary, Provo, Utah, and which said letter was then and there of the tenor following, to wit:

Great Western Coal Mines. General offices, 208 Newhouse Building. Telephone Wasatch 2610. Mines, Carbon County, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft

SALT LAKE CITY, UTAH, *April 27, 1921.*

Mrs. D. M. GRAY,

c/o County Infirmary, Provo, Utah.

DEAR MADAM: I am enclosing your certificate of guarantee, which acts as an additional safeguard to the investment you recently made in this company. We believe that we have one of the best coal properties in the United States, which is located in the heart of the best bituminous coal districts in the world.

The market for Utah coals on the coast is gradually increasing, and there is no question in my mind but what the coal business of Utah is now in its infancy and on the verge of its greatest development.

The Government is arranging for a fleet to be placed on the Pacific coast. California at the present time is producing considerable less oil than is consumed in that State. Oil is the nec-
16 essary fuel for Government ships, and as soon as this fleet reaches the coast California will have to make other arrangements for fuel purposes.

Our coal beds are the nearest to the coast of any in the United States, which means that in a short time we will be shipping large quantities of coal west. The moneyed interests of this State, as well as other States, are fast becoming interested in the coal business. Coal is one of the main essentials of any nation, and according to a report published in Sunday's "Telegram" we have enough coal to last this company for fifty-seven thousand years and only oil enough to last nine and a quarter years; this means that we are going to see some big developments in the coal business in this part of the country in the next few years.

The United States leads the world in the exporting of coal at the present time, and the demand for coal in this country is increasing every day. This simply means that we will always have a good, strong market for coal produced in Carbon County, and I consider an investment in this company one of the safest possible to make.

Hoping that you will give us all the assistance possible in making this company the success it should be, we are,

Yours very respectfully,

GREAT WESTERN COAL MINES.

EJW MU E. J. WELCH.

They, the said defendants, well knowing the said letter to be of and concerning said scheme and artifice to defraud, and for the purpose of executing the same and attempting so to do, and to effect the object of the said unlawful conspiracy aforesaid.

17 That thereafter, to wit, on or about the sixth day of May, 1921, according to and in pursuance of said unlawful

conspiracy, combination, confederation, and agreement aforesaid, and during the existence of said unlawful conspiracy, and to effect the object of the same, and for the purpose of executing and bringing about the accomplishment and completion of the aforesaid scheme and artifice to defraud, and attempting so to do, the said Joseph S. Welch, at Salt Lake City, aforesaid, did knowingly, wilfully, unlawfully, and feloniously, place and cause to be placed in the post office of the United States at Salt Lake City, in the State and Central Division of the District of Utah aforesaid, to be sent and delivered by the post-office establishment of the United States, a certain letter, enclosed in an envelope, postage prepaid, and addressed to Mrs. D. M. Gray, % County Infirmary, Provo, Utah, and which said letter was then and there of the tenor following, to wit:

Great Western Coal Mines. General offices, 208 Newhouse Building. Telephone, Wasatch 2610. Mines, Carbon County, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft.

SALT LAKE CITY, UTAH, *May 6, 1921.*

Mrs. D. M. GRAY,
% County Infirmary, Provo, Utah.

DEAR MADAM: On April 13th, you subscribed for $1,000.00 interest in the Great Western Coal Mines. There is $50.00 due on your subscription May 1st, which completes the $1,000.00 payment.

18 Hoping that you will mail this in to us at once and thanking you for your subscription, we are,
Very respectfully yours,

GREAT WESTERN COAL MINES,
EJW:MU JOS. S. WELCH.

They, the said defendants, well knowing the said letter to be of and concerning said scheme and artifice to defraud, and for the purpose of executing the same and attempting so to do, and to effect the object of the said unlawful conspiracy aforesaid.

That thereafter, to wit, on or about the 29th day of June, 1921, according to and in pursuance of said unlawful conspriacy, combination, confederation, and agreement aforesaid, and during the existence of said unlawful conspiracy, and to effect the object of the same, and for the purpose of executing and bringing about the accomplishment and completion of the aforesaid scheme and artifice to defraud, and attempting so to do, the said Earl J. Welch, at Salt Lake City aforesaid, did knowingly, wilfully, unlawfully, and feloniously place and cause to be placed in the post office of the United States at Salt Lake City, in the State and Central Division of the District of Utah aforesaid, to be sent and delivered by the post office establishment of the United States, a certain letter, enclosed in an envelope, postage prepaid, and addressed to Mrs. D. M. Gray, % County Infirmary, Provo, Utah, and which said letter was then and there of the tenor following, to-wit:

Great Western Coal Mines. General offices, 208 Newhouse Building.
Telephone, Wasatch 2610. Mines, Carbon County, Utah.
19 Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft

SALT LAKE CITY, UTAH, *June 29, 1921.*

Mrs. D. M. GRAY,
c/o County Infirmary, Provo, Utah.

DEAR MRS. GRAY: Mr. Storrs just came back from Helper and has been down over the coal property. He states that the ranch is in very fine condition and that we are going to have a good crop. The coal seams have been faced off, and we are doing all that we possibly can for the progress and development of the Great Western Coal Mines, and the assistance of everyone interested will be a big help to us in making this company the success it should be.

Mr. Storrs will return to Price this week, and while on this trip he will put an engineer to work laying out the town for the Great Western Coal Mines.

Instead of having a number of small towns up Gordon Creek for each coal camp, we are going to have one large town at the mount of the canyon, which will accommodate all the employees of the different companies that develop coal properties in this section of the country. It is our intention to have each miner own his own home and a small acreage which will enable him to raise a garden and farm products during his spare time. We want to have one of the most up-to-date camps in the State, and we believe that this plan will enable us to have the most up-to-date churches, schools, stores, and amusement halls, and we will be able to make an attractive place for residence.

20 The ex-State mine inspector tells us that we have some of the best undeveloped coal land he ever saw. Coal hasn't taken much of a drop, and for this reason the dealers have not stored coal this year. This simply means that this fall and winter the mines will be running to capacity in order to supply the consumer with the necessary coal, and the probabilities are that we will see a coal famine this year.

The United States is exporting more than twice the amount of coal of any nation in the world to-day. We are exporting lots of coal to the Pacific coast, and inasmuch as our coal mines are farthest west of any in the United States this belongs to us.

The coal business to-day is in its infancy. According to a report given by some of the leading geologists of this country, we have oil enough to last for nine and a quarter years and coal enough to last for more than fifty-seven thousand years. This country is exporting more coal than any nation in the world, and our coal fields are in what you might call the development stages.

Big interests from all over the country are fast becoming interested in our coal lands, and if we care to participate in the wealth which is now in its raw stages in Utah, we will have to get busy and grasp these opportunities as they are presented to us.

No square a man ever lived than Mr. George A. Storrs. He along with others interested in this company have had considerable experience in the coal business. Mr. Croft, one of the large stockholders here, opened the Black Hawk, which is today the largest single producer in the world. He also opened the Peerless, which has done exceptionally well in the last two and a half years of its development period.

21 The assets of this company, along with the experience these men have had in the development of coal properties, all go to assure us of a very successful camp up Gordon Creek. And your assistance in every way possible will help to assure us of a successful outcome.

This $1,000.00 is one among many thousands that have been put into this company for the preparation of the property for a bond issue, when your money is returned along with three shares of stock for every dollar that you let us have. You haven't a thing to worry about, and we are as anxious as you to have this money returned, and as soon as we get on the bond issue, we will return your thousand dollars. It is impossible for us to give a definite date as to when you can expect your money, but we can assure you of the fact that you have made an exceptional investment and that your money will be returned; and some day the stock you hold in the Great Western Coal Mines will be worth a lot of money. At that time you will appreciate the investment you have made with us and perhaps wish that you had increased the amount instead of doing as you are at the present time, worrying about the small amount you have with us.

Sometime in the immediate future we would appreciate having you call at the office and will be able to go over the maps with us and show you our holdings, which I believe will set your mind at rest so far as the investment is concerned; and we will do our best to see that your money is returned among the first so that you will have it to take care of your building plan.

22 Again thanking you for the assistance given thus far and hope that you will continue to assist us in the development of what we consider the best property in the State.

Very respectfully yours,

GREAT WESTERN COAL MINES,

EJW MU E. J. WELCH.

They, the said defendants, well knowing the said letter to be of and concerning said scheme and artifice to defraud, and for the purpose of executing the same and attempting so to do, and to effect the object of the said unlawful conspiracy aforesaid.

That thereafter, to wit, on or about the third day of August, 1921, according to and in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and during the existence of said unlawful conspiracy, and to effect the object of the same, and for the purpose of executing and bringing about the accomplishment and completion of the aforesaid scheme and artifice to defraud

and attempting so to do, the said Earl J. Welch, at Salt Lake City, aforesaid, did knowingly, wilfully, unlawfully, and feloniously, place and cause to be placed in the post office of the United States at Salt Lake City, in the State and central division of the district of Utah aforesaid, to be sent and delivered by the post-office establishment of the United States a certain letter, enclosed in an envelope, postage prepaid, and addressed to Mr. Lewis Herrick, 859 E. 9th So., City, and which said letter was then and there of the tenor following, to wit:

Great Western Coal Mines. General offices, 208 Newhouse Building. Telephone, Wasatch 2610. Mines, Carbon County, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft

23 SALT LAKE CITY, UTAH, *August 21, 1921.*

MR. LEWIS HERRICK,
859 E. 9th So., City.

DEAR SIR: We still have a few thousand dollars to raise before we get on the bond issue, at which time we will return to the present subscribers their money and give for the use of this money three shares of stock for every dollar that has been loaned us. Your assistance in raising the balance of the money necessary to enable us to bond this property will help us to hasten the return of your money. A safer and better proposition than the one we are offering has never been put on the market in this State.

Mr. Storrs has just returned from Gordon Creek, and he states that the people of Carbon County are very much enthused over the developments of the Great Western Coal Mines. The town site has been surveyed and we have approximately two thousand lots that we will put on the market in the very near future. If these lots bring $100.00 apiece that will earn for the company $200,000.00.

Each day conditions are brighter for the Great Western Coal Mines. You probably noticed by last Sunday's "Tribune" that Mr. Hoover advises the public in general to get busy and fill their coal bins, and that the price of coal will not drop. We will see a coal shortage this winter, and it is going to be the opportune time for us to put out coal on the market. The coal business in this State is in its infancy, and those who realize this fact are going to profit by their investments in the Great Western Coal Mines.

24 In order to raise the balance of the money necessary to prepare this property for bond issue quickly so that we might bond this property and get the coal on the market as soon as possible, we are asking that each subscriber turn in the names of those in his community who he thinks have money that could be invested in a proposition of this kind, and for every name that is turned in and sold from this office we will give $5.00 in cash. We ought to sell from this office from three to five out of every ten names mailed to us, and it takes you but a few minutes to think of these names and

inclose them in a self-addressed envelope. In order that you might get these *b*ames out without trouble and delay, we are inclosing a blank form which is to be used for this purpose.

We hope that you will mail these names to us just as quickly as possible, and every name that we sell we will return check for $5.00.

Thanking you for the assistance given to the Great Western Coal Mines up to date, we are,

Very respectfully yours,

GREAT WESTERN COAL MINES,
E. J. WELCH.

EJW MU

They, the said defendants, well knowing the said letter to be of and concerning said scheme and artifice to defraud, and for the purpose of executing the same and attempting so to do, and to effect the object of the said unlawful conspiracy aforesaid.

That thereafter, to wit, on or about the 15th day of September, 1921, according to and in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and during the existence of said unlawful conspiracy, and to effect the object of the same, and for the purpose of executing and bringing about the accomplishment and completion of the aforesaid scheme and artifice to defraud and attempting so to do, the said Earl J. Welc*j*, at Salt Lake City, aforesaid, did knowingly, wilfully, unlawfully, and feloniously place and cause to be placed in the post office of the United States at Salt Lake City, in the State and Central Division of the District of Utah aforesaid, to be sent and delivered by the post office establishment of the United States, a certain letter, enclosed in an envelope, postage prepaid, and addressed to Mr. Andy Kopasick, Castle Gate, Utah, and which said letter was then and there of the tenor following, to wit:

Great Western Coal Mines. General Offices, 208 Newhouse Building. Telephone, Wasatch 2610. Mines, Carbon County, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft

SALT LAKE CITY, UTAH, *September 15, 1921.*

MR. ANDY KOPASICK,
Castle Gate, Utah.

DEAR SIR: Mr. J. Prezel is interested in the Great Western Coal Mines and gave us your name with a request to make an explanation of what we are offering, with the thought in mind that you possibly would be interested in a deal of this kind.

I am enclosing one or two letters of reference regarding Mr. Geo. A. Storrs. He has had considerable experience in the developing of coal properties and the building of railroads in the intermountain country.

He opened the Spring Canyon Coal Mines and spent better than $600,000.00 there and operated this property for six years, during which time he made of it one of the best coal properties in this country.

Mr. C. M. Croft, one of the largest owners in the Great Western Coal Mines, has had considerable experience in the coal business, having opened up the Black Hawk, which is to-day the largest single producer in the world, and he also opened the Peerless, which has been a very good mine.

Messrs. Storrs, Croft, and others know the possibilities of the coal business. They became interested in the Great Western Coal Mines to the extent of their lifetime earnings.

I am enclosing two letters written by Mr. Geo. A. Storrs, which gives somewhat of an idea of how we are handling this business. He has invested in the Great Western Coal Mines $127,000.00.

The ranch which adjoins the coal lands is listed with Dun and Bradstreet at $375,000.00, and the 1,800 acres of coal land has three seams of coal varying from ten to fifteen feet in thickness, and according to geological survey we have better than 110,000,000 tons of coal there. We are raising a certain amount of money which is to be used for the financing of a $600,000.00 bond issue, and giving as security for the money that is invested with us at the present time three shares of stock for every dollar a man invests, with a par value of $1.00 per share.

The money invested with us will be returned as soon as the
27 bonds have been sold, and this will leave a man three shares of stock, which represents the interest on the amount of money he lets us have at the present time.

We fully realize that it is impossible for us to make clear in detail our proposition, but if the proposition is as represented it warrants a man investing his money with us. It is impossible for a man to subscribe to this issue after October first.

On receipt of your check we will mail you a certificate of guarantee, which is very much in the form a of note, which you hold against the company until your money is returned and you have received three shares of stock for every dollar you put in. This money should be returned in less than six months' time.

If you do not feel so disposed to invest your money with us without further explanation, kindly notify us by telephone or letter and we will have *our* representative call and explain a proposition we consider most meritorious from any point of view.

Hoping you will join us in making the Great Western Coal Mines the largest and best camp in the State, we are,

Very respectfully yours,

GREAT WESTERN COAL MINES.
E. J. WELCH.

EJW: MU

We have a town site at the mouth of Gordon Creek Canyon which is surrounded by coal property and ranch land which consists of 2,537 lots varying in price from $75.00 to $300.00 per lot, better than $0,000.00 of these lots have been sold, and we are selling about twenty *lost* a day at the present time. These lots will net us better than $200,000.00.

28 They, the said defendants, well knowing the said letter to be of and concerning said scheme and artifice to defraud, and for the purpose of executing the same and attempting so to do, and to effect the object of the said unlawful conspiracy aforesaid.

That thereafter, to wit, on or about the eighth day of November, 1921, according to and in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and during the existence of said unlawful conspiracy, and to effect the object of the same, and for the purpose of executing and bringing about the accomplishment and completion of the aforesaid scheme and artifice to defraud and attempting so to do, the said defendants, at Salt Lake City, aforesaid, did knowingly, wilfully, unlawfully, and feloniously place and cause to be *placed* in the post office of the United States at Salt Lake City, in the State and Central Division of the District of Utah, aforesaid, to be sent and delivered by the post-office establishment of the United States, a certain letter, enclosed in an envelope, postage prepaid, and addressed to Mr. John Zeno, Midvale, Utah, and which said letter was then and there of the tenor following, to wit:

Great Western Coal Mines. General offices 902 Clift Building. Telephone Wasatch 2610. Mines, Carbon County, Utah. Branch office. Fiscal agents: Earl J. Welch, Jos. W. Welch, C. M. Croft, Geo. A. Storrs

SALT LAKE CITY, UTAH, *November 8, 1921.*

Mr. JOHN ZENO.

29 DEAR SIR: The Great Western Coal Mines Company has been duly organized and a bond issue of $300,000.00, 8 per cent first-mortgage gold bonds is to be offered to the public.

These bonds are $100.00, $150.00, $500.00, and $1,000.00 denomination and bear interest at the rate of eight per cent per annum, from November 1, 1921. Interest is payable semiannually. They are secured by all the coal lands and farming lands formerly held by the Cedar Mesa Farm, which have been turned over to the Great Western Coal Mines Company. The bonds are redeemable November 1, 1931.

A good many of our holders of certificates of guarantee have requested us to convert the cash-surrender value of their certificates into bonds, which we believe is a very good move for them to make. To all those who desire to do this the company will give as a bonus one share of stock for every dollar in bonds taken this way. This will then give you the three shares for every dollar loaned on the certificate of guarantee, together with one more share for every dollar in bonds where certificate of guarantee is surrendered. In other words, you will receive four shares of the capital stock where bonds are purchased with your certificate of guarantee.

We have enclosed a self-addressed envelope which you may use for mailing in your certificate of guarantee. Just sign this letter at the

bottom and mail certificate to us. We will then mail you your stock certificate, together with bonds to the amount of your certificate of guarantee.

We believe Great Western will be one of the best camps in
30 the State. Our railroad is already under construction, and we should be shipping coal for the 1922 season.

Yours for success,

GREAT WESTERN COAL MINES COMPANY.

Please find inclosed certificate of guarantee No. _____ for $ _____. Please issue me bonds for cash surrender value of the certificate and mail four shares of the capital stock together with the bonds to me.

_____ _____.

They, the said defendants, well knowing the said letter to be of and concerning said scheme and artifice to defraud, and for the purpose of executing the same and attempting so to do, and to effect the object of the said unlawful conspiracy aforesaid.

That thereafter, to wit, on or about the 23rd day of November, 1921, according to and in pursuance of said unlawful conspiracy, combination, confederation, and agreement aforesaid, and during the existence of said unlawful conspiracy, and to effect the object of the same, and for the purpose of executing and bringing about the accomplishment and completion of the aforesaid scheme and artifice to defraud and attempting so to do, the said defendants at Salt Lake City, aforesaid, did knowingly, wilfully, unlawfully, and feloniously, place and cause to be placed in the post office of the United States, at Salt Lake City, in the State and Central Division of the District of Utah, as aforesaid, to be sent and delivered by the post office establishment of the United States, a certain letter, enclosed in an envelope, postage prepaid, and addressed to Mr. P. L. Ward, Springville, Utah, and which said letter was then and there of the tenor following, to wit:

31 Great Western Coal Mines. General offices, 902 Clift Building. Telephone, Wasatch 2610. Mines, Carbon County, Utah. Branch office, Helper, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft, Geo. A. Storrs

SALT LAKE CITY, UTAH, *November 23, 1921.*

MR. P. L. WARD,
Springville, Utah.

DEAR SIR: We acknowledge receipt of your letter of November 23, together with check for $58.00 which pays your subscription for $333.00 in full, and thank you very much for your bond subscription for this amount.

We are enclosing certificate for 1,000 shares of stock which is the stock due on your subscription for $333.00.

The bonds are in denominations of $100.00, $150.00, $500.00, and $1,000.00; we can not issue $333.00 worth of bonds. If you will

send us your check for $17.00 we will send you $350.00 in bonds, together with 350 shares of stock. If you cannot mail your check right away, the company will allow you a little time to make this additional payment.

Please let us know if it will be O. K. to enter your subscription for $350.00 in bonds*m* and oblige,

Yours very truly,

GREAT WESTERN COAL MINES COMPANY,
J. L. WELCH.

JLW:MU.

They, the said defendants, well knowing the said letter to be of and concerning said scheme and artifice to defraud, and for the
32 purpose of executing the same and attempting so to do, and to effect the object of the said unlawful conspiracy aforesaid.

And so the grand jurors aforesaid, upon their oaths as aforesaid, do say: That said defendants, during the period of time, at the place, and in the manner and form aforesaid, unlawfully, wilfully, and feloniously have conspired to commit an offense against the United States of America, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors of the United States of America aforesaid, upon their oaths as aforesaid, do further find and present:

Second count

That one George A. Storrs, and one Jos. S. Welch, and one Earl J. Welch, and one Charles M. Croft, hereafter called defendants, prior to the 25th day of November, 1921, at Salt Lake City, Salt Lake County, State and Central Division of the District of Utah, and within the jurisdiction of this court, did knowingly, wilfully, unlawfully, fraudulently, and feloniously devise a scheme and artifice to defraud all such persons thruout the State of Utah who could, or might, be induced by means of the fraudulent and false devises, artifices, representations, pretenses, and promises hereinafter mentioned, to invest sums of money and other valuable property as loans to or as the purchase price of pretended first mortgage bonds, or of townsite lots of a corporation to be organized, and which was thereafter organized and known as Great Western Coal Mines Company, either directly or as a result of solicitation on the part of said
33 defendant, or the agents, representatives, and associates of said defendants, and to obtain from said persons who might be induced as aforesaid*m* by means of said false and fraudulent representations, devices, pretenses, and promises said sums of money and other valuable property, which said sums of money and other valuable property said defendants would apply, in whole or in part, to their own use and gain; and, for the purpose of executing said scheme and artifice to defraud and in attempting so to do, to place

or cause to be placed in the post office of the United States at Salt Lake City, aforesaid, to be sent and delivered by the post office establishment of the United States certain letters, prospectuses, writings, and advertisements, in violations of section 215 of the Federal Penal Code.

The said scheme and artifice to defraud so to be devised and intended to be devised as aforesaid, and which was in fact devised, was in substance and effect as follows, that is to say:

It was the intent, object, and purpose of the said defendants to organize, or cause to be organized, under the laws of the State of Utah, a certain corporation, which corporation should be formed and organized for the pretended purpose of carrying on coal mining operations in Carbon County, State and District of Utah, for the pretended benefit and profit of the persons to be defrauded, who should and did invest money and other valuable property in said corporation; that said corporation so to be organized was in fact not to be organized in good faith for the carrying on of coal-mining operations in Carbon County, State and District of Utah, or in any other place, for the benefit and profit of said persons
34 to be defrauded, who should and did invest sums of money and other valuable property in said corporation, but was to be and was thereafter organized for the personal benefit, profit, and financial gain of the said defendants, and to induce and persuade the said persons to be defrauded to pay and send their money and other valuable property to the defendants under their own names, and under the name of defendants as "fiscal agents" and under the name of the Great Western Coal Mines and Great Western Coal Mines Company; and to induce and persuade the said persons to be defrauded to pay and send their money and property as aforesaid, it was the intent and object of said defendants by word of mouth and by means of letters, prospectuses, newspaper articles, maps, and plats, to make, and the defendants did make, either directly or through agents, representatives, and associates of said defendants, false and fraudulent pretenses, representations, and promises to the persons to be defrauded, concerning the purpose, object, organization, stability, financial condition, property holdings, and coal-land holdings of said corporation, and the nature, extent, and value of coal deposits and coal lands which the defendants should and did, at the time such false and fraudulent pretenses, representations, and promises were to be made and were made, claim said corporation to be organized as aforesaid, would and did own and control, and concerning the opportunity offered persons investing money and other valuable property in said corporation to make large financial gains and profits.

That as part of said scheme and artifice the said defendants did on or about the 21st day of October, 1921, organize and cause to be organized, under the laws of the State of Utah, a certain corporation, to wit, Great Western Coal Mines Company.

That among the false and fraudulent pretenses, representations, and promises so to be made, and so made, by the said defendants, the falsity of which the said defendants, and each of them, at all times well knew, were particularly the following:

1. That the property holdings to be acquired, and which were acquired by the said Great Western Coal Mines Company from a certain corporation, namely, Cedar Mesa Farm, Inc., included extensive and valuable deposits of coal, and a large acreage of coal lands, containing between 800 and 1,800 acres, in Carbon County, State of Utah, which said deposits and coal lands the said Cedar Mesa Farm, Inc., owned and controlled; whereas, in truth and in fact, the said Cedar Mesa Farm, Inc., did not at any time own or control, or have any valid interest in or title to, any coal deposits or coal lands except about nine (9) acres of coal lands, either in Carbon County, State of Utah, or elsewhere; and the said Great Western Coal Mines Company did not acquire from the Cedar Mesa Farm, Inc., or from any other corporation or person, throughout the period of time hereinbefore alleged, any coal deposits or coal lands, or any valid interest in or title thereto except about nine (9) acres of coal lands.

2. That the money and other property advanced, paid, and sent by persons to invest in said corporation was used and to be used in getting the property to be acquired, and which was acquired by the said Great Western Coal Mines Company, in shape for a first-mortgage bond issue of $600,000.00, and to construct a railroad to certain coal properties adjoining and including the holdings of the said Cedar Mesa Farm, Inc., and to develop coal properties claimed by the defendants to have been acquired by or which were
36 then under the control of the said Great Western Coal Mines Company; whereas, in truth and in fact, no part of said money or other valuable property advanced, paid, or sent by persons induced to invest in said corporation was used in the development of any coal property or properties at all, nor to construct the said railroad, except a very small part thereof, nor in getting said property in shape for the issuance of first-mortgage bonds to the amount of $600,000.00, or any other amount; but, on the contrary, the said money and other valuable property so advanced, paid, and sent, as aforesaid, was used and kept, either in whole or in large part, by the said defendants and their agents and representatives as commissions and for the payment of their personal debts and obligations.

3. That the bonds issued by said Great Western Coal Mines Company were to be, and in fact were, first-mortgage bonds; whereas, in truth and in fact, said bonds were not first-mortgage bonds, said bonds being only secured by property upon which there were then, and at all times thereafter up to the present time, certain existing and valid prior mortgages, liens, and incumbrances in large amounts.

4. That the said Great Western Coal Mines Company should be shipping coal for the 1922 season; whereas, in truth and in fact, no

coal has ever been shipped at all by the said Great Western Coal Mines Company up to the time of the returning of this indictment, and the said defendants never intended that shipment should or could be made of coal by the said Great Western Coal Mines Company for the said 1922 season.

That said defendants and each of them, thruout the period of time hereinbefore alleged, well knew of the falsity and fraudulent
37 and misleading character of said representations, claims, promises, and pretenses, and of the falsity and fraudulent character and purposes of said artifice and scheme and device; and that all and singular of the false and fraudulent statements, representations, pretenses, and promises hereinbefore set forth would be, and were intended by said defendants and each of them to be made and done for the fraudulent purpose on the part of the said defendants and each of them to deceive the said persons so to be defrauded, and fraudulently to induce said persons and each of them, to advance, pay and send, sums of money and other valuable property to said defendants, their agents and representatives, or to said Cedar Mesa Farm, Inc., or said Great Western Coal Mines Company, as loans to said Great Western Coal Mines Company, or as the purchase price for pretended first-mortgage bonds, or town-site lots of said Great Western Coal Mines Company, and to cheat and defraud said persons so to be defrauded as aforesaid, with the intent then and there on the part of said defendants and each of them to convert said sums of money and other valuable property so fraudulently obtained as aforesaid, either in whole or in part, to the use, gain and benefit of the said defendants and each of them.

That said defendants on or about the 25th day of November, 1921, at Salt Lake City, State and Central Division of the District of Utah, aforesaid, and within the jurisdiction of this court, for the purpose of executing said scheme and artifice to defraud and in attempting so to do, did then and there, knowingly, wilfully, unlawfully, and feloniously place and cause to be placed in the post office of the United States at Salt Lake City aforesaid, to be sent and delivered by the post-office establishment of the United States, a certain letter enclosed in an envelope, postage prepaid, and addressed
38 to Mr. C. W. Wandell, Murray, Utah, which said letter was then and there of the tenor following, to wit:

Great Western Coal Mines. General offices 902 Clift Building. Telephone Wasatch 2610. Mines, Carbon County, Utah. Branch office, Helper, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft, Geo. A. Storrs

SALT LAKE CITY, UTAH, *Nov. 29, 1921.*

Mr. C. W. WANDELL,
Murray, Utah.

DEAR SIR: We received your certificate of guarantee this morning, and are enclosing stock certificate for 300 shares of Great Western Coal Mines stock.

The company has been given permission, by the State Securities Commission, to sell three hundred thousand dollars' worth of first mortgage gold bonds. To the holders of certificate of guarantee who desire to turn in the cash value of the certificate as payment for bonds, the company will give, as bonus, one share of stock for every dollar in bonds purchased. There has been a great many of our certificates of guarantee holders who turned in their certificates on bonds, the bonds bear 8 per cent interest from Nov. 1st, 1921, and are secured by all the holdings of the company. If you wish to purchase one of these one hundred dollar bonds just return your certificate to us and we will mail you the bond, together with stock certificate for 100 shares.

It will probably be about January or February first before
39 the money can be returned to you in the event you do not wish to buy bonds with the certificate.

Please let us hear from you, and oblige,

Yours truly,

GREAT WESTERN COAL MINES CO.,
LW V By J. L. WELCH.

They, the said defendants then and there well knowing the said letter to be of and concerning said scheme and artifice to defraud and for the purpose of executing the same and attempting so to do, as aforesaid; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

And the grand jurors aforesaid, upon their oaths as aforesaid, do further present and find:

Third count

That said George A. Storrs, the said Jos. S. Welch, the said Earl J. Welch, and the said Charles M. Croft, hereafter called defendants, so having devised said scheme and artifice to defraud and to obtain money under false and fraudulent pretenses, representations, and promises, described and set forth in the second count of this indictment, the allegations concerning which in said second count are incorporated by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice to defraud and attempting so to do, at Salt Lake City aforesaid, in the State and Central Division of the District of Utah, and within the jurisdiction of this court, on or about
40 the 7th day of December, 1921, did then and there knowingly, wilfully, unlawfully, and feloniously, place and cause to be placed in the post office of the United States at Salt Lake City aforesaid, to be sent and delivered by the post office establishment of the United States, a certain letter, enclosed in an envelope, postage

prepaid, and addressed to Mr. P. L. Ward, Springville, Utah, which said letter was then and there of the tenor following, that is to say:

Great Western Coal Mines. General offices, 902 Clift Building. Telephone, Wasatch 2610. Mines, Carbon County, Utah. Branch office, Helper, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft, Geo. A. Storrs

SALT LAKE CITY, UTAH, *Dec. 7, 1921.*

Mr. P. L. WARD,
Springville, Utah.

DEAR SIR: We are enclosing bonds numbers A–46–47, B–1009, total three hundred fifty ($350) dollars, together with three hundred fifty shares of stock for which you subscribed and paid for with your certificate of guarantee.

Thanking you again for the assistance given the company and with best wishes, we are,

Yours truly,

GREAT WESTERN COAL MINES CO.,
JLW V. By J. L. WELCH.

They, the said defendants then and there will knowing the said
41 letter to be of and concerning said scheme and artifice to defraud, and for the purpose of executing the same, and attempting so to do; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

And the grand jurors of the United States of America, aforesaid, upon their oaths as aforesaid, do further present and find:

Fourth count

That said George A. Storrs, the said Jos. S. Welch, the said Earl J. Welch, and the said Charles M. Croft, hereafter called defendants, so having devised said scheme and artifice to defraud and to obtain money under false and fraudulent pretenses, representations, and promises, described and set forth in the second count of this indictment the allegations concerning which in said second count are incorporated by reference thereto in this count as fully as if they were here repeated, for the purpose of executing said scheme and artifice and attempting so to do, at Salt Lake City aforesaid, State and Central Division of the District of Utah, and within the jurisdiction of this court, on or about the 9th day of December, 1921, did then and there, knowingly, wilfully, unlawfully, and feloniously place and cause to be placed in the post office of the United States at Salt Lake City aforesaid, to be delivered and sent by the post-office establishment of the United States a certain letter enclosed in an envelope, postage prepaid, and addressed to Mr. O. W. Wandell,

Murray, Utah, which letter was then and there of the tenor following, that is to say:

42 Great Western Coal Mines. General offices, 902 Clift Building. Telephone Wasatch 2610. Mines, Carbon County, Utah. Branch office, Helper, Utah. Fiscal agents: Earl J. Welch, Jos. S. Welch, C. M. Croft, Geo. A. Storrs.

SALT LAKE CITY, UTAH, *Dec. 9, 1921.*

Mr. C. W. WANDELL,
Murray, Utah.

DEAR SIR: In answer to your letter of Dec. 7th, we desire to state that we are extremely sorry that you cannot find your way clear to accept our very excellent proposition that we are making to our stockholders in securing an 8 per cent gold bond with an additional share of stock for each dollar loaned in lieu of the money returned, but we appreciate very much your interest shown in the Great Western Mines Company, and any time you are in Salt Lake City call at our office, 902 Clift Bldg., as we are very anxious to become acquainted with all of our stockholders.

Best wishes, we remain,
Very respectfully,

GREAT WESTERN COAL MINES CO.,
CMC V By CHAS. M. CROFT, *Sec't.*

They, the said defendants, then and there well knowing the said letter to be of and concerning said scheme and artifice to defraud and for the purpose of executing the same and attempting so to do, contrary to the form of the statute in such case made and pro-
43 vided and against the peace and dignity of the United States of America.

A. P. BIGELOW,
Foreman of the Grand Jury.

CHARLES M. MORRIS,
United States Attorney.
EDWARD M. MORRISSEY,
Assistant United States Attorney.

Witnesses: George Woolley, Heber C. Hicks, Jessie E. Sandford, Serge B. Campbell, E. L. Jackson, E. J. Keefe, George Bywater, Shekrey Sheya, C. R. Greene, Nijib (Jim) Sheya, A. E. Gibson, Lawrence T. Dee, E. F. Soderberg, Heber C. Jex, S. H. Drysdale O. S. Drysdale, Mrs. D. M. Gray, Lewis Herrick, George V. Morris, C. W. Wandell, F. C. Bertolina, Celeste Diapaz, John Gabatz, Joe Ossana, R. S. Lund, George Rasmussen, Fred Clark, Mrs. E. A. Fuller, Lars A. Johnson, Charles Anderson, Herman Niepag, Arvill Miller, C. A. Sandquist, W. J. Warner, Andy Kopasick, George P. Bosovich, John Zrno, Hrman Teichman, C. M. Hansen, Frank F. Ulrich, Joe Colzani, Edward Wells, Patrick L. Ward, James H. Dunkley, A. L. Welliver, Hyrum E. Crockett, Harvey Cluff.

[File endorsement omitted.]

44 In United States District Court

Plea of not guilty

Nov. 15, 1924

At this 15th day of November, 1924, comes Charles M. Morris, United States attorney, and the said defendants in their own proper persons, and the said George A. Storrs by Jacob Evans, his attorney, and the defendants Joseph S. Welch, Earl J. Welch, and Charles M. Croft, by Thos. W. O'Donnell, their attorney, also come. And said defendants are arraigned, and each saith that his true name is as charged, each waives the reading to him of this indictment, and on being required to plead thereto, each saith that he is not guilty as therein charged. And of this they put themselves upon the country and the said United States attorney doth the like.

In United States District Court

Order allowing withdrawal of pleas of not guilty

Feb. 24, 1925

At this 24th day of February, 1925, comes Charles M. Morris, United States attorney, and the defendant, George A. Storrs, by Jacob Evans, his attorney, and the other defendants by M. E. Wilson and Dan B. Shields, their attorneys, also come. And on their motion and by leave of court each of said defendants withdraws the plea of not guilty heretofore by him pleaded to this indictment and file their pleas in abatement. And it is further ordered that
45 the hearing of said pleas be set for the 25th day of February, 1925.

In United States District Court

Plea in abatement of defendant George A. Storrs filed

Feb. 24, 1925

And now comes George A. Storrs, one of the above named defendants, and says that he ought not to be further held to answer to said indictment, and that the same should abate because, he says, that at the time and place of and on the occasion when the grand jurors of the United States of America for the territory comprising the Northern and Central Division of the District of Utah were hearing, inquiring into, and examining the matter of the presentation of the indictment now returned into court against these defendants, one Edward M. Garnett, the official court stenographer of the United States District Court, and divers other persons whose names are to this defendant unknown, not members of said grand jury and not

persons lawfully authorized to be and remain with said grand jurors while they were so conducting said inquiry, were present with said grand jurors while they were so hearing, inquiring into, and examining the matter of presenting said indictment.

And the said defendant further says that said indictment should be abated because, at the sitting of said grand jurors and while they were considering the matter of said indictment and the complaints recited therein, and while said grand jurors were hearing testi-
46 mony concerning the same, there was present in said grand jury room with said grand jurors and within the hearing of what transpired and listening to what was said, with the consent of the United States district attorney, a person who was not district attorney representing the United States of America, nor a witness in said cause, nor was such person authorized by law to be in said grand jury room at said time.

And said defendant says said indictment should be abated because said person unauthorized to be in said grand jury room as aforesaid was one Edward M. Garnett, stenographer, who pretended to take down in shorthand the evidence given by each and all of the witnesses who were called and examined before said grand jury and who has, since the finding of said indictment, reduced said shorthand notes to typewriting for the use and benefit of the United States district attorney and such person or persons as said United States district attorney might permit to use said testimony; that thereby the secrecy of the proceedings before said grand jurors was destroyed and the hearing became public, contrary to law.

And said defendant further says that said indictment should be abated because not only that said testimony was taken in shorthand by said Edward M. Garnett, as aforesaid, but also because said Edward M. Garnett had in no wise or at all been appointed by any officer of the United States to in any wise or at all conduct said proceedings before said grand jurors; that said Edward M. Garnett was not authorized or appointed to in any manner or at all assist the United States district attorney in conducting said proceedings as a counsellor or attorney-at-law, but was present at said proceed-
ings and before said grand jurors only for the purpose of
47 transcribing the testimony of the witnesses sworn and heard before said grand jury as a stenographer, and for no other purpose; that said Edward M. Garnett, in so taking or transcribing said notes did not act as an attorney or counsellor-at-law, either pursuant to appointment or otherwise or at all, and that the presence of said Edward M. Garnett in taking said stenographic notes was in violation of law and contrary to and in violation of the fifth amendment of the Constitution of the United States, which in no manner or at all permits any person to be present while testimony is being taken before a grand jury, except the United States district attorney or some one acting in that capacity, and that said Edward M. Garnett was not in any sense acting in said capacity.

And said defendant says that said indictment should be abated because the United States district attorney for the District of Utah took part in the deliberations of the grand jury and was present in said grand jury room for a time while said grand jury was deliberating upon the matter of finding said indictment: that said United States district attorney, after said testimony had been heard by said grand jury, either at the request of some of the grand jurors or of his own volition, undertook to restate some portions of the testimony that had been heard by said grand jurors, and undertook to give a summary of the testimony as it had been given by said witnesses, and thereby substituted his own recollection of the testimony for that of the grand jurors, and thereby undertook to aid the grand jurors in recalling said testimony; and, further, that said United States district attorney, during the course of the
48 deliberations of said grand jury, advised said grand jurors that any indictment, if found, must be against all of the above named defendants, and thereby the said grand jury and its members were unlawfully and erroneously influenced in finding the aforesaid indictment.

And the aforesaid statements this defendant stands ready to verify by competent proof.

Wherefore this defendant prays that the aforesaid indictment be abated and held for naught and that the defendant be not required to answer to the same.

JACOB EVANS,
Attorney for Defendant, George A. Storrs.

Received copy of foregoing plea in abatement this 24th day of February, 1925.

CHAS. M. MORRIS,
United States Attorney.

[File endorsement omitted.]

In United States District Court

Plea in abatement of Defendants Joseph S. Welch et al.

Filed Feb. 24, 1925

And now come Joseph S. Welch, Earl J. Welch, and Charles M. Croft, three of the above-named defendants, each for himself and not one for the other, and say that they ought not to be further held to answer to said indictment, and that the same should abate
49 because, they say, that at the time and place of and on the occasion when the grand jurors of the United States of America for the territory comprising the Northern and Central Division of the District of Utah, were hearing, inquiring into, and examining the matter of the presentation of the indictment now returned into court against these defendants, on Edward M. Garnett, the official court stenographer of the United States District Court, and divers

other persons, whose names are to these defendants unknown, not members of said grand jury and not persons lawfully authorized to be and remain with said grand jurors while they were so conducting said inquiry, were present with said grand jurors while they were so hearing, inquiring into, and examining the matter of presenting said indictment.

And the said defendants further say that said indictment should be abated, because at the sitting of said grand jurors and while they were considering the matter of said indictment and the complaints recited therein, and while said grand jurors were hearing testimony concerning the same, there was present in said grand-jury room with said grand jurors and within the hearing of what transpired concerand listening to what was said, with the consent of the United States district attorney, a person who was not district attorney representing the United States of America, nor a witness in said cause, nor was such person authorized by law to be in said grand-jury room at said time.

And said defendants say said indictment should be abated because said person unauthorized to be in said grand-jury room as aforesaid was one Edward M. Garnett, stenographer, who pretended to take down in shorthand the evidence given by each and all of the witnesses who were called and examined before said grand jury, and who has, since the finding of said indictment, reduced said shorthand notes to typewriting for the use and benefit of the United States district attorney, and such person or persons as said United States district attorney might permit to use said testimony; that thereby the secrecy of the proceedings before said grand jurors was destroyed and the hearing became public, contrary to law.

And said defendants further say that said indictment should be abated because not only that said testimony was taken in shorthand by said Edward M. Garnett, as aforesaid, but also because said Edward M. Garnett has in no wise or at all been appointed by any officer of the United States to in any wise or at all conduct said proceedings before said grand jurors; that said Edward M. Garnett was not authorized or appointed to in any manner or at all assist the United States district attorney in conducting said proceedings as a counsellor or attorney-at-law, but was present at said proceedings and before said grand jurors only for the purpose of transcribing the testimony of the witnesses sworn and heard before said grand jury as a stenographer, and for no other purpose; that said Edward M. Garnett, in so taking or transcribing said notes did not act as an attorney or counsellor-at-law, either pursuant to appointment or otherwise or at all, and that the presence of said Edward M. Garnett in taking said stenographic notes was in violation of law and contrary to and in violation of the fifth amendment of the Constitution of the United States, which in no manner or at all permits any

person to be present while testimony is being taken before a
51 grand jury, except the United States district attorney, or
soke one acting in that capacity, and that said Edeard M. Garnett was not in any sense acting in said capacity.

And said defendants say that said indictment should be abated because the United States district attorney for the District of Utah took part in the deliberations of the grand jury and was present in said grand jury room for a time while said grand jury was deliberating upon the matter of finding said indictment; that said United States district attorney, after said testimony had been heard by said grand jury, either at the request of some of the grand jurors or of his own volition, undertook to restate some portions of the testimony that had been heard by said grand jurors, and undertook to give a summary of the testimony as it had been given by said witnesses, and thereby substituted his own recollection of the testimony for that of the grand jurors, and thereby undertook to aid the grand jurors in recalling said testimony; and, further, that said United States district attorney, during the course of the deliberations of said grand jury, advised said grand jurors that any indictment, if found, must be against all of the above named defendants, and thereby the said grand jury and its members were unlawfully and erroneously influenced in finding the aforesaid indictment.

And the aforesaid statements these defendants stand ready to verify by competent proof.

Wherefore these defendants pray that the aforesaid indictment be abated and held for naught, and that the defendants be not required to answer to the same.

52 DAN B. SHIELDS,
M. E. WILSON,
Attorneys for defendants, Joseph S. Welch, Earl J. Welch, and Charles M. Croft.

Received copy of foregoing plea in abatement this 24th day of February, 1925.

CHAS. M. MORRIS,
United States Attorney.

[File endorsement omitted.]

In United States District Court

Opinion

Filed Mar. 6, 1925

This question raised by the plea in abatement in this case *case* have never been before the Circuit Court of Appeals of this circuit. The Supreme Court could have refused, and probably did refuse, to grant a writ of certiorari in the Wilkes case, 263 U. S. 716, 719, because of the state of the record in that case.

In view of the uncertainty in respect of the ground upon which the application for the writ was refused by the Supreme Court, and in view of the conflict in the decisions of the lower Federal courts, both trial and appellate, I feel free to exercise my own judgment and decide the matters presented by the plea in abatement in accordance with what I conceive to be the better reasons.

53 The grand jury system was created and developed as a bulwark of the private citizen against the aggressions of the English Crown. This character was secured and maintained through the secrecy of its proceedings and the independence of its action. It may be that in these modern days of enlightened progress under a free government there is less reason for the continued existence of these ancient landmarks originally erected to protect the citizen against a strong and sometimes unscrupulous government. However that may be, it is just as well to remember that zeal and aggression often come to the same end in actual results. The distinguishing characteristics of the grand jury system which justified its existence in the past, and, aside from the requirements of the Constitution, which justifies its continuance in the future, should not be jeopardized by any strained statutory construction or arbitrary judicial pronouncement in the interest of convenience to government prosecuting or investigating officers.

The right to perpetuate a record of the evidence in one case being conceded, the right to do so in every case must be allowed. To say that there may be a permanent record of the evidence taken before a grand jury made and kept outside of and beyond the supervision and control of the court, forever thereafter accessible to and capable of being used by men in nowise connected with the grand jury investigation, even though public officers, is a perversion of the grand jury system and will sooner or later work injustice to parties investigated; and witnesses making full disclosure before a grand jury, without particular regard to the strict rules of evidence,

54 should not be required to take the chance of being called upon outside a court room to explain their testimony so given to the party under investigation, or his friends, long after the investigation should have been forgotten and the testimony given consigned to the oblivion originally contemplated, and observed until recent years.

In my opinion the plea in abatement in this case is well taken and judgment will be entered accordingly.

[File endorsement omitted.]

In United States District Court

Order granting pleas in abatement

Mar. 6, 1925

At this 6th day of March, 1925, the separate pleas in abatement of said defendants having heretofore come on regularly for hearing,

upon said pleas, the oral demurrer thereto, and the evidence introduced, and the same having been argued by counsel and submitted and by the court taken under advisement, now after due consideration and the court being well advised in the premises doth sustain said pleas, in accordance to a written opinion this day handed down and filed herein, counsel to prepare and submit a form of judgment to be entered herein.

55 In United States District Court

Judgment filed

March 6, 1925

The defendants in the above-entitled cause, and each of them, having heretofore by leave of court first had and obtained withdrawn their pleas of not guilty, and having by leave of court each filed his plea in abatement in the above-entitled cause, seeking thereby to quash and abate the indictments in said cause, and said pleas having come on for hearing before the court upon the demurrers of the plaintiff, and upon the evidence introduced by the plaintiff and the defendants, and the arguments of counsel for said parties, and the court being now fully advised in the premises,

It is hereby ordered, adjudged, and decreed that the prayers of said pleas in abatement of said defendants to set aside, abate, and hold for naught and quash said indictments be and the same are hereby granted as to each of said defendants, and said indictments are hereby quashed and abated as to each of said defendants.

Exceptions are hereby allowed to the plaintiff as to each of the defendants herein.

Done in open court this 6th day of March, A. D. 1925.

TILLMAN D. JOHNSON, *Judge.*

[File endorsement omitted.]

56 [Petition for rehearing, covering 2 pages, filed March 13, 1925, omitted from this print. It was denied and nothing more by order. April 8, 1925.]

58 In United States District Court

Order denying petition for rehearing

April 8, 1925

At this 8th day of April, 1925, comes Charles M. Morris, United States attorney, and the said defendants by M. E. Wilson, their attorney, also come. And the petition of the United States of America for a rehearing upon the pleas in abatement heretofore granted and the order quashing the indictment as to each of said defendants

coming on now regularly to be heard, each of said defendants object to the said petition being entertained by the court on the ground that there is no authority of law for the same, and the court being well advised in the premises doth overrule said objection, to which ruling each of said defendants excepts, and the court after due consideration doth deny said petition for a rehearing, to which ruling said United States attorney then and there duly excepted.

In United States District Court

Bill of exceptions

Filed April 23, 1925

59 Be it remembered, that on this twenty-fifth day of February, in the year of our Lord nineteen hundred and twenty-five, the above-entitled cause came on for hearing upon the pleas in abatement herein, before the Honorable Tillman D. Johnson, judge of said court, the United States being represented by Charles M. Morris, Esq., United States district attorney, the said defendant George A. Storrs, being represented by Jacob Evans, Esq., his attorney, and the said defendants Joseph S. Welch, Earl J. Welch, and Charles M. Croft being represented by M. E. Wilson, Esq., and D. B. Shields, Esq., their attorneys, and thereupon the following proceedings were had:

Colloquy between court and counsel

The COURT. Gentlemen, are you ready to proceed?

Mr. MORRIS. Ready, if the court please.

Mr. MORRIS. If the court please, it appears in this case, which is United States of America, plaintiff, versus George A. Storrs, Joseph S. Welch, Earl J. Welch, and Charles M. Croft, defendants, that two pleas in abatement have been filed, one plea in abatement on behalf of the defendants, Joseph S. Welch, Earl J. Welch, and Charles M. Croft, and the other plea in abatement on behalf of the defendant George A. Storrs.

It appears further that both pleas are substantially in the same language, I understand exactly in the same language, except for the necessary change in names, and so forth.

Mr. WILSON. Yes.

Mr. MORRIS. Now, if the court please, with reference to the pleas in abatement filed on behalf of the defendants, Joseph S. Welch, Earl J. Welch, and Charles M. Croft, I desire at this time and do demur to the plea in abatement upon the following grounds:

First: That the plea in abatement does not allege any preju-
60 dice or injury to the defendants or either of them by reason of the matters and things set forth in the plea.

Secondly, upon the ground that the plea does not allege any facts upon which prejudice or injury to the defendants, or either one of them, could be based or predicated.

Thirdly, upon the ground that the last paragraph of the plea, which begins at the center of the middle of page 3 of the typewritten copy is too uncertain and indefinite as to amount to a valid objection to the indictment, in that the plea, and particularly this paragraph of the plea, does not allege who of the defendants, if any, was injured or prejudiced by the matters set forth in said paragraph.

I further demur to the plea in abatement interposed on behalf of the defendant George A. Storrs, and for grounds of demurrer I ask that the same grounds heretofore set forth and given as grounds for demurrer to the plea in abatement as to the other defendants be set forth as to the demurrer with respect to the plea in abatement of the defendant George A. Storrs, without repeating or reiterating the grounds.

Is that satisfactory, Mr. Evans?

Mr. EVANS. Yes.

Mr. MORRIS. If the court please, inasmuch as the argument on this demurrer, or these demurrers, is so interwoven with the main argument of the case I would suggest, in economy of time and repetition, that the argument as to the demurrers be submitted in connection with the other argument, which undoubtedly will be submitted on other issues involved in this matter.

The COURT. Is that satisfactory?

Mr. WILSON. That is satisfactory as far as I am concerned.

Mr. EVANS. Yes; that is all right.

Mr. MORRIS. I will say, in view of the lateness of the hour yesterday when I received a copy of the pleas, I did not have time to make a written, or prepare a written, demurrer to either one of the pleas; therefore I spoke at least to Mr. Wilson this morning, representing three of the defendants, if it would be satisfactory if I made the demurrer orally, which he assented to. Is that correct, Mr. Wilson?

Mr. WILSON. That is correct.

Mr. MORRIS. Is that satisfactory, Mr. Evans?

61 Mr. EVANS. Yes.

Mr. WILSON. In order to make up the record as far as the clients I represent are concerned, Mr. Morris might well have this transcribed and formally filed in the record, if he prefers to do so. I think it would make a better record, your honor.

The COURT. When it comes to making up a record, it can be copied and filed in the usual way as a paper in the case.

Mr. WILSON. That is satisfactory. Then, I take it, at this time, your honor, the demurrer will be overruled without argument, subject to the right to argue it later?

The COURT. I will just consider it as submitted, and you may proceed to introduce your testimony upon the merits of the case so we will have both matters before us when you do argue it.

WAYNE T. WILCOX was thereupon called as a witness by the defendant, and, being duly sworn, testified as follows:

Direct examination by Mr. WILSON:

Q. What is your business, Mr. Wilcox?

A. I am assistant secretary of the Halloran-Judge Trust Company.

Q. You reside in Salt Lake City, Utah?

A. Yes, sir.

Q. Have resided here for many years?

A. Yes, sir.

Q. Mr. Wilcox, were you a member of the grand jury that returned the indictment in this case before the court?

A. Yes, sir.

Q. When did that grand jury sit?

A. Started some time in September and finished in October.

Q. Could you give the exact dates?

A. No; I could not.

The COURT. May we agree upon the dates as the record shows?

Mr. MORRIS. Yes.

Mr. WILSON:

Q. About how long did you sit in considering this case?

A. About four days.

62 Q. Here in the Federal court room?

A. Yes, sir.

Q. I will ask you, Mr. Wilcox, whether you know Edward M. Garnett, the court reporter here?

A. I know him by sight; yes, sir.

Q. Was he present in the grand jury room during the taking of the testimony in this case?

A. Yes, sir.

Q. Where the grand inquest, as we call it, was held?

A. Yes, sir.

Q. Throughout the entire time?

A. No; not exactly.

Q. That is, throughout the entire time that the testimony was taken?

A. Yes, sir.

Q. Did he do anything in the grand jury room except to take the testimony?

A. No, sir.

Q. That you observed. After the taking of that testimony, did he retire?

A. He did.

Q. That is, when you came to consider, you jurors, you and your cogrand jurors came to consider the testimony, Mr. Garnett was not present?

A. No, sir.

Q. Now, was Mr. Charles M. Morris present during the taking of the testimony?

A. Yes, sir.

Q. United States district attorney?

A. Yes, sir.

Q. Did he interrogate the witnesses?

A. Yes, sir.

Q. After the testimony had been taken, I will ask you whether or not Mr. Morris in any manner went over the testimony with the grand jury.

63 Mr. MORRIS. Now, if the court please, I object to this question upon two grounds: first, upon the ground that the question is too indefinite, and secondly, upon the ground that a grand juror, under his oath of office, cannot disclose what took place with reference to the proceedings before a grand jury, and thirdly, upon the ground that it is incompetent, irrelevant, and immaterial.

Mr. WILSON. As to the indefinite character of the question, your honor, perhaps I can make it a little plainer, but as to the balance of the objections, I resist them.

The COURT. Reframe your question.

Mr. WILSON:

Q. I will ask you whether or not, Mr. Morris in any manner restated the important points of this testimony to the grand jury after the testimony had been taken?

A. Yes, sir.

The COURT. You make your objection?

Mr. MORRIS. Yes; before the answer is given.

The COURT. That may go out.

Mr. MORRIS. I object to the question upon the ground that it is immaterial, irrelevant, incompetent; upon the further ground that the testimony of the witness discloses that he was a member of this particular grand jury and as such cannot either under his oath as a grand juror or otherwise make disclosures of the proceedings occurring in the grand jury room.

The COURT. I will overrule the objection; you may move to strike it out. I will strike it out if your point seems to be true.

Mr. MORRIS. Exception.

Mr. WILSON. You may answer the question now.

A. After the proceedings, after the testimony had been given, he made a brief résumê of the salient points of the testimony that had been offered, at the request of the grand jurors.

Q. About how long? You say briefly?

A. Oh, possibly didn't take more than three or four minutes, just a very brief outline.

Q. And in that went over, as you say, the salient points of the testimony that had been introduced?

64 A. Yes, sir.

Q. Some grand jurors requested that?

A. Yes, sir.

Q. After the grand jury had deliberated upon this testimony and the matter for some little time, I will ask you whether Mr. Morris was again sent for?

A. Yes, sir; he was.

Q. By the grand jury?

A. Yes, sir.

Q. I will ask you whether or not at that time any question was put to him—just answer that yes or no.

A. Yes; it was.

Q. And what was that question?

A. He was asked whether or not it would be possible for an indictment to be rendered against certain of the defendants and not the others.

Q. And what did Mr. Morris reply?

A. He replied that it would be impossible to segregate the defendants, that if an indictment was brought, it would have to be brought against all of them, or not any.

Q. And then did he retire without further conversation?

A. Yes, sir.

Mr. WILSON. Cross-examine.

Cross-examination by Mr. MORRIS:

Q. State whether or not Mr. Morris suggested the returning of an indictment.

A. He did not.

Q. As against all the defendants or any one?

A. No, sir; he did not.

Q. State if it is not a fact that Mr. Morris said the indictment would be brought against any one or all of the defendants.

A. Not to my knowledge.

Q. Isn't it a fact, Mr. Morris made that statement on several occasions during the proceedings of this case?

65 A. Not to my knowledge.

Q. Isn't it a fact, Mr. Morris made that statement on several occassions during the proceedings of this case?

A. Not to my knowledge; no, sir.

Q. Can you recall just what Mr. Morris said with respect to the returning of an indictment against the defendants, if anything?

A. Mr. Morris made this statement, that after we had asked him whether or not it would be possible to render an indictment against some of the defendants and not all, he said that an indictment, if brought, would have to include all of the defendants and they could not be segregated.

Q. Did Mr. Morris mention any names?

A. No, sir.

Q. Did any grand juror suggest to Mr. Morris the name of any person who should not be or who should be included in an indictment in case one was brought?

A. No, sir.

Q. No names were mentioned at all?

A. No, sir.

Mr. MORRIS. That is all.

Mr. WILSON. That is all.

CHARLES M. CROFT was thereupon called as a witness and being duly sworn, testified as follows:

Direct examination by Mr. WILSON:

Q. State your name to the court.

A. Charles M. Croft.

Q. Are you one of the defendants in this case?

A. Yes, sir.

Q. Were you before the grand jury as a witness when the grand inquest was held before this indictment was returned?

A. Yes, sir; I was before the grand jury.

Q. I will ask you, Mr. Croft, when you were before the grand jury, whether Mr. Edward M. Garnett, the court reporter here, was present in that room?

66 A. Yes, sir.

Q. What was he doing?

A. He was taking down the testimony.

Q. In shorthand?

A. Yes, sir.

Q. About how long were you before the grand jury?

A. Oh, I think it may have been about an hour.

Q. And during all that time was Mr. Garnett there?

A. Yes, sir.

Q. Was there any other person except the grand jurors, Mr. Garnett and Mr. Morris, United States district attorney——

A. Mr. Morris was not there.

Q. He was not there at the time?

A. He was not there. No one else that I know of.

Q. No one else except Mr. Garnett and the grand jury, that you know of?

A. That is correct.

Q. In other words, you didn't know, I don't presume, the members of the grand jury?

A. I was acquainted with some of them, but some were strangers to me.

Q. Was there any person pretending to act as assistant district attorney there?

A. No.

Q. While you were there?

Mr. MORRIS. I object to that as calling for a conclusion.

The COURT. You mean by that asking questions?

Mr. WILSON. Yes.

Q. In other words, were you interrogated by the grand jurors, or by some person who was asking questions to aid the grand jury, is all I intend.

A. By the grand jury.

Q. By the grand jury. After this indictment was returned, did you see a transcript of your testimony?

67 A. I saw a part of the transcript of my testimony.

Q. Where did you see it?

A. I saw it in the auditors' room, the auditors that were auditing the books for the Government in this building.

Q. The Government auditors?

A. Yes, sir.

Q. What are their names?

A. Now, I don't know the name of one of them; Mr. Keefe was in the room at the time and was assisting in the work.

Q. Who was Keefe?

A. Keefe was the man that made the former investigation for land office on the Bird entry.

Q. Government employee or officer?

A. Employee.

Q. Special agent?

A. Special agent.

Q. Did he have what purported to be a typewriten transcript of your testimony given before the grand jury?

A. Yes, sir.

Q. Did you read some of it?

A. I read some of it.

Cross-examination by Mr. MORRIS:

Q. You don't know whether that was a typewritten copy of your testimony or not, do you?

A. Yes, sir; it was.

Q. How do you know?

A. Because I read a part of it.

Q. Is that the only means you have of knowing?

A. That is the only means; of course, it was written there verbatim as I had given it before the grand jury?

Q. You remembered that, did you?

A. Yes, sir.

Q. You didn't ascertain from any certificates of the person

68 who reported or recorded it that it was your testimony, did you?

A. No, I didn't.

Q. You draw your conclusion merely from your recollection of what you said before the grand jury?

A. Yes, sir; that is correct. It was written there just as I had testified.

Q. According to your recollection.
A. Oh, yes; certainly.
Q. You were before the grand jury at your own request?
A. Yes, sir; that is correct.
Mr. MORRIS. That is all.
Mr. WILSON. That is all.

EDWARD M. GARNETT was thereupon called as a witness and, being duly sworn, testified as follows:

Direct examination by Mr. WILSON:

Q. State your full name to the court.
A. Edward M. Garnett.
Q. You are the official court reporter for this court?
A. I am the acting reporter of this court.
Q. Well, I beg your pardon if I haven't stated the title correctly.
A. There is no official reporter in this court except in equity cases.
Q. And in all other matters you have generally acted, have you not?
A. I have.
Q. Are you admitted as an attorney at law by the supreme court of this State?
A. I am.
Q. Have you ever been admitted to the Federal court?
A. I have.
Q. You do not practice law, however?
A. I do not.
69 Q. And never have pretended to?
A. I have.
Q. How long since?
A. About twenty years?
Q. By that answer, do you mean you have not practiced in twenty years?
A. That is what I mean.
Q. And you were not practicing law at the time the grand jury held its grand inquest in the case at bar?
A. I was not.
Q. You were present in the grand jury room during the taking of the testimony at that grand inquest, were you not?
A. I was.
Q. You were not there as an assistant United States attorney were you?
A. I was so designated by the Attorney General of the United States.
Mr. WILSON. I move that the answer be stricken on the ground it is not responsible.
The COURT. I think I will let it stand. Let's develop what the facts were. You can argue it later.

Mr. WILSON. I would like to have an exception so my record is made.

The COURT. Very well.

Mr. WILSON:

Q. You were not acting as an attorney in the grand jury room, were you?

A. I was not.

Q. You were there simply as a stenographer taking down shorthand notes of the witnesses giving the testimony before that grand jury?

A. That is what I did.

Q. And that is all that you did?

A. It is.

70 Q. And you did take down the testimony of all the witnesses who appeared before the grand jury, so far as you know, in this matter?

A. Yes.

Q. Took it down in shorthand?

A. Yes.

Q. And afterwards transcribed it into typewriting?

A. Caused it to be transcribed.

Q. Well, it was done under your direction, anyhow?

A. It was.

Q. And your custom in doing that has been to dictate it to a dictaphone and then have a typist write it out on a machine?

A. Ordinarily; not always.

Q. Did you do that in this case?

A. I did.

Q. And how many persons worked on that testimony in transcribing it?

A. One, and possibly two.

Q. How many copies of that transcript did you made?

A. I made an original and one copy.

Q. To whom did you deliver the original and one copy of the transcript?

A. I delivered the original to Mr. Morris, Charles M. Morris, United States district attorney, and I have the copy in my possession at the present time.

Q. The original you delivered to Mr. Charles M. Morris, United States district attorney?

A. I did.

Q. And what became of it after that; I presume you don't know?

A. I do not.

Q. About how long, if you can tell me, did the taking of the testimony—how long a time did it consume, Mr. Garnett, before the grand jury? Can you tell me accurately, without looking it up?

A. I can not tell you accurately without looking it up, but to my recollection it was about four days.

71 Q. I assume you could later examine your transcript of your notes and give us the length of time absolutely correct, could you not?

A. I could.

Q. Mr. WILSON. Will you do that, and may he do that for the benefit of the record?

Mr. MORRIS. That is satisfactory.

Mr. WILSON. That is all.

Mr. WILSON. I would like to add to the objection I made, your honor, to strike out on the ground it was not responsive, on the ground also it was incompetent and not the best evidence.

The COURT. Let the record so show.

Mr. WILSON. And I have an exception to the ruling of the court.

Cross examination by Mr. MORRIS:

(Exhibit 1 marked by the reporter.)

(Exhibit 1A marked by the reporter.)

(Exhibit 2 marked by the reporter.)

Q. Mr. Garnett, I show you Exhibit 1 and ask you if that is the letter upon the authority of which you appeared before the grand jury on the occasion about which you have testified?

A. It is.

Mr. MORRIS. If the court please, we offer Exhibit 1.

Mr. WILSON. In behalf of the defendants Joseph S. Welch, Earl J. Welch, and Charles M. Croft, I ask to enter the following objection: We object to the introduction of Government Exhibit No. 1 on the ground that it is immaterial to the issue before the court, it already appearing from the testimony that E. M. Garnett did nothing before the grand jury except to act as a stenographer, and on the ground that Exhibit No. 1 is incompetent and irrelevant, incompetent to prove any matter or thing involved in this proceeding, and on the ground that it is irrelevant to any issue involved here, and on the ground that it does not authorize Edward M. Garnett to appear before any grand jury, or particularly the grand jury involved in this indictment and take testimony in shorthand or otherwise; and on the ground that if it does authorize any such proceeding on the part of E. M. Garnett, it is contrary to law and for that reason void.

72 The COURT. Do you make the same objection on behalf of your client?

Mr. WILSON. My associate here requests me to add that it is in violation of the fifth amendment to the Constitution of the United States, which I took it was included in the idea that it was contrary to law, but I assert that specifically.

Mr. EVANS. If the court please, on behalf of Mr. George A. Storrs, the defendant, we join in this objection.

The COURT. That is, you make it on behalf——

Mr. EVANS. We make it on behalf of George A. Storrs.

The COURT. Let the record so show.

Mr. MORRIS. If the court please, before ruling on that objection, mak I ask a question or two so that the matter will be fully before the court?

Mr. MORRIS:

Q. Mr. Garnett, state whether or not the investigation of the Great Western Coal Mines Company mentioned in Exhibit 1 was the investigation out of which the indictment in the instant case arose.

Mr. EVANS. We object to that, if the court please, because the indictment itself shows that it had absolutely nothing to do with the Great Western Coal Mines Company. The matters alleged in the indictment as I remember it are all before the organization of the Great Western Coal Mines Company.

Mr. WILSON. Same objection on behalf of the other defendants.

The COURT. I think you better put it this way, for the purpose of identification, show Mr. Garnett the indictment and ask him if the indictment, as he understands, was returned upon that investigation. I suppose you gentlemen will admit that.

Mr. MORRIS:

Q. Mr. Garnett, I show you the indictment returned into this court, No. 8489 Criminal, which is the file number in the United States Court for the District of Utah, and ask you to examine the indictment and state whether or not the investigation mentioned in Exhibit 1 of the Great Western Coal Mines Company resulted in the return of the indictment which is No. 8489 heretofore mentioned?

73 Mr. WILSON. We would like to have the same objection, your honor—I take it it is unnecessary to repeat it—that we have already made.

The COURT. Certainly; it is understood. All of his answers are subject to your objection.

Mr. EVANS. We would like to have it stated any objection that may be made on the part of Mr. Wilson may be regarded as made on the part of Mr. Storrs.

The COURT. It may be so understood hereafter, all objections may be understood as being in behalf of all and each of the defendants.

Mr. WILSON. Then I will make the objections in that form, if Mr. Evans gives me authority so to do.

The COURT. He seems to be giving you that authority.

Mr. EVANS. I am, your honor; that will save time.

A. The matters contained in this indictment referred to were the subject matter of the investigation referred to.

Mr. MORRIS:

Q. I will ask you, Mr. Garnett, whether or not during the presentation of the evidence before the grand jury, out of which indictment 8489 resulted, you furnished from time to time parts of tran-

script of the testimony taken before the grand jury, to the United States attorney for the District of Utah?

A. That is my recollection.

Q. State whether, during that period the United States attorney for the District of Utah had you refer to your notes to refresh the recollection of the district attorney with reference to certain matters mentioned by him at the time such request was made?

A. Yes; I remember such instances, but I could not specify what parts of the testimony the district attorney so requested.

Mr. MORRIS. We again renew our offer of Exhibit No. 1.

Mr. WILSON. We make the same objection in behalf of all the defendants, your honor. I take it it is not necessary to repeat it.

The COURT. No; it is understood. The objection as now renewed may be overruled.

Mr. WILSON. And these exceptions, your honor, I would
74 like to have them run for the benefit of each defendant severally and all of them jointly.

The COURT. It may be so understood; each defendant is making a separate objection and exception.

Exhibit 1

Address reply to "The Attorney General" and refer to initials and number. 36–77–3–8.

DEPARTMENT OF JUSTICE,
Washington, D. C., October 18, 1924.

Mr. E. M. GARNETT,
Salt Lake City, Utah.

SIR: You are hereby appointed a special assistant to the United States attorney, District of Utah, under the authority of the Department of Justice to assist in the trial of two mail fraud cases, namely, the Great Western Coal Mines Company, and the Consolidated Mascot Mines Corporation, in which the Government is interested; and in that connection you are specifically directed to conduct, in any judicial district where the jurisdiction thereof lies, any kind of legal proceedings, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys are authorized by law to conduct.

Your compensation will be determined by the Attorney General upon the conclusion of your services and will be paid from the appropriation for "Miscellaneous expenses, U. S. Courts."

Please execute and return the inclosed oath of office.

Respectfully,

(Signed) HARLAN F. STONE,
Attorney General.

Through the United States attorney.
(in ink) O K RLH

75 Mr. MORRIS:

Q. Mr. Garnett, did you, in accordance with the direction contained in Exhibit 1, file with the Attorney General of the United States an oath of office?

A. I did.

Q. I show you Exhibit 1-A and ask you if that is a true copy of the oath which you subscribed and filed with the exception, of course, that the blanks contained in the form which I show you were filled out by you in accordance with the instructions contained in Exhibit 1?

A. To the best of my recollection this is an exact copy.

Q. Can you, Mr. Garnett, fill in the blanks precisely as they were filled in the original?

A. Yes.

Q. Will you do so?

A. I am unable to state the exact date that the oath was subscribed. The oath was forwarded to the Attorney General, duly executed, on October 21, 1924, but my recollection is, it was executed before that date, and mailed later, on the date named.

Q. That is, you subscribed to the oath and executed it before a notary public residing at Salt Lake City, Utah?

A. I did.

Q. And that was done prior to the investigation of the grand jury with respect to the case of the Great Western Coal Mines Company?

Mr. WILSON. That is objected to on the ground it is a conclusion in addition to the grounds already made. The thing ought to speak for itself, and the record ought to speak for itself; not the best evidence.

Mr. MORRIS. Of course, that is true, that the original is the best evidence, but in view of the fact it was impossible to get the original——

Mr. WILSON. I am not complaining about that. My point is this—what date was this indictment filed in court?

Mr. MORRIS. It states on the back.

The COURT. The oath of the assistant is not filed in the clerk's office?

Mr. MORRIS. No; that was forwarded direct to the Attorney General.

76 Mr. WILSON. I don't want to be technical about that. I presume we can check up the date if it is not correct. Preserving my general objection, I will withdraw this last one.

The COURT. Is it a statutory oath?

Mr. WILSON. There is no statute on the subject.

Mr. MORRIS. It is prescribed by the department.

The COURT. Can't it be understood, under your objection, that the witness took the departmental oath?

Mr. WILSON. If he says so, we will not dispute it.

The COURT. Some time prior——

Mr. WILSON. I am not so certain about that, but I am somewhat confused about the date; that is, about when this hearing was held. That is why I wanted Mr. Garnett to state accurately when the hearing was held. If that statement were made, we can perhaps straighten out the rest of the matter.

The COURT. We can check that up.

Mr. MORRIS:

Q. Mr. Garnett, the copy of oath which is found in Exhibit 1–A, the blanks of which you have filled out, with the exception of the date when the same was subscribed, is an exact copy of the oath which you subscribed and took with reference to the Great Western Coal Mines Company investigation?

A. It is, to the best of my knowledge and belief.

Q. You did subscribe that oath, did you not?

A. I did, and forwarded the same—executed and forwarded the same to the Attorney General before the date of the hearing of the Great Western Coal Mines matter.

Q. I will ask you if you forwarded the oath by letter?

A. I did.

Q. I show you Exhibit 2 and ask you if that is an exact copy of the letter addressed to the Attorney General, Washington, D. C., in which you transmitted or forwarded the oath of office, a copy of which is marked "Exhibit 1–A"?

A. It is.

Q. And I ask you if you forwarded that on the day the latter bears date, October 21, 1924?

A. I did.

77 Mr. MORRIS. If the court please, we offer Exhibit 1–A.

The COURT. You make the same objection?

Mr. WILSON. I want to ask the witness a question or two.

Mr. MORRIS. I also offer Exhibit 2.

Mr. WILSON:

Q. In regard to Exhibit 1–A, Mr. Garnett, could you tell the date upon which you took that oath? Have you any means of telling?

A. Not without reference to the original, which was forwarded to Washington.

Q. Looking at Exhibit 2, which is a copy of letter which you sent to the Attorney General, I notice that is dated October 21. Does that in any wise refresh your recollection as to when you made the oath?

A. It does not.

Q. Exhibit No. 2 is the letter which you wrote to the Attorney General, and with that letter you enclosed the original of Exhibit 1–A, did you not?

A. I did.

Q. Don't you recall whether you made out the oath at the same time you wrote the letter, or substantially the same time, or made it out some time prior thereto?

A. I do not so remember, for this reason: Exhibit 1, which is the letter of authority from the Attorney General, in addition to the case you speak of, also mentions another case, to wit, the Consolidated Mascot Mines Corporation, which case, as I remember, was heard by the grand jury before the case you refer to—before the case at bar. The oath which I sent covered, of course, both cases.

Q. But at any rate, Mr. Garnett, you did not have any such authority with reference to either of the cases you have mentioned until you received Exhibit No. 1, did you?

A. I could not state definitely, Mr. Wilson, for the reason that my recollection is a telegram came first, to the district attorney's office, with reference to these cases.

Q. Exhibit No. 1, you will note, was written on the 18th day of October, 1924.

A. Yes.

78 Q. You did not receive it until some days after that?

A. I did not.

Q. And pursuant to Exhibit No. 1, you made out the oath which you testified to, did you not?

A. Either upon that or upon telegraphic authority to the district attorney.

Q. Then let us understand, you say on your oath that Exhibit No. 1 had anything to do with your taking the oath in this case?

A. Until I see the telegram, if there was such a telegram, and which I have not in my possession, I could not state that, Mr. Wilson.

Q. You could not state it had anything to do with this case?

A. The oath which I forwarded may have been executed upon the receipt of a telegram; of that I am not sure.

Q. And it may not have been executed upon receipt of a telegram?

A. It was executed and forwarded either upon the receipt of a telegram of authority or this letter, Exhibit 1.

Q. And dependent then, upon whether you received a telegram or not depends the materiality of Exhibit No. 1, does it not?

A. Do you want a legal opinion on that?

Q. No, I will take the fact. In other words the question is this, Mr. Garnett, you are not certain that Exhibit No. 1 had anything to do with your taking the oath, the original of which is evidenced by the copy, Exhibit 1-A?

A. I repeat, it was upon that or upon a telegram.

Q. That is the best answer you can give?

A. Yes, sir.

Mr. WILSON. I want to make an objection to these documents, your honor, first to Exhibit No. 1—I have already objected and add to it that it now appears from the testimony that it may, or may not, be material; it is not shown to be material, and the grounds I have already stated. I stated to the district attorney, as far as the question of copy was concerned, while I wish to preserve all my other objections, your honor, to Exhibit 1-A, I want to waive that, just as a copy, and the same as to Exhibit No. 2.

79 Mr. MORRIS. That it is not the best evidence, because it is a copy?

Mr. WILSON. I don't want to waive anything else except the fact that you have not produced the original.

Mr. MORRIS. That, you do waive?

Mr. WILSON. Yes, I do waive that.

The COURT. The objection will be overruled. This may all come up in the discussion.

Mr. WILSON. We may have a separate exception as to each of them?

Exhibit 1-A

I, E. M. Garnett, do solemnly swear that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; that I will well and faithfully discharge the duties of the office of special assistant to the United States attorney, District of Utah on which I am about to enter: So help me God.

(Sign here) E. M. GARNETT.

Subscribed and sworn to before me this ——— day of ——— A. D. 192—.

Where born (State only) Virginia.

Date of birth, January 10, 1877.

Whence appointed: State, Utah; County, Salt Lake; Congressional District, 2nd.

[SEAL.]

———— ————,
Notary Public.

Date of entry upon duty ———.

Residence, Salt Lake City.

80 *Exhibit 2*

OCTOBER 21, 4.

THE ATTORNEY GENERAL,
Washington, D. C.

SIR: Referring to your letter of October 18th, 36-77-3-8, I enclose herewith oath duly executed as special assistant to the United States attorney, District of Utah, to assist in the trial of two mail fraud cases, namely, the Great Western Coal Mines Company, and the Consolidated Mascot Mines Corporation.

Respectfully,

E. M. GARNETT.

Mr. MORRIS. We rest.

Mr. WILSON. I would like as ask Mr. Garnett one further question, if I might, your honor.

Q. You say, Mr. Garnett, that you, according to your recollection, from time to time during the taking of this testimony before

the grand jury and the grand inquest which resulted in this indictment, transcribed portions of the testimony and furnished it to the district attorney?

A. That is my recollection: yes, sir.

Q. Did you at any time see any portions of that testimony being used before the grand jury after you had furnished it to him?

A. I have no recollection of such.

Q. Have you any recollection of handing any portion of the transcript to the grand jury, or any member thereof?

A. I have a recollection that I did not.

Q. Positive that you did not?

A. I am.

Q. Did you read any of the transcript or any of the stenographic notes to the grand jury during its session?

A. Not other than possibly a question being re-read, or an answer.

Q. You did that, from time to time, as requested?

81 A. If requested; yes.

Q. And you were requested?

A. I could not state definitely.

Q. Your best recollection is that you were on several occasions during the hearing so requested?

A. That is my best recollection.

Mr. WILSON. That is all. We rest now.

Mr. MORRIS. We rest.

EDWARD M. GARNETT was thereupon recalled as a witness and testified as follows:

Mr. MORRIS. Before proceeding with the argument, I would like to ask Mr. Garnett whether or not he has, during the recess of court since yesterday, ascertained the precise time the grand jury was in session for the consideration of the case which the indictment at bar was returned?

A. I have.

Q. State, will you please, Mr. Garnett, when that proceeding began before the grand jury.

A. On October 23rd.

Q. And what days did it continue?

A. October 23, 24, 27, 28, 29, and 30.

Q. During all of which days testimony was offered and received by the grand jury?

A. Yes.

Q. That makes six days in all?

A. Yes.

Mr. WILSON:

Q. Upon the dates omitted, those dates omitted no testimony was taken?

A. No testimony was taken on those dates, the dates being Saturday and Sunday, October 25 and 26.

Mr. WILSON. This testimony, of course, becomes a part of the testimony offered pursuant to our understanding?

Mr. MORRIS. Yes. Mr. Garnett was requested to verify these dates in order to make the record complete.

82 Mr. WILSON. Yes; that was the understanding.

The COURT. Q. Mr. Garnett, how are these special attorneys paid?

A. The attorney general fixes their compensation in his discretion.

Q. In this particular case your compensation was fixed how, as a stenographer or as an attorney?

A. It was fixed at $10.00 per day and forty-five cents a page for transcript.

Now, in furtherance of justice and that right may be done, the plaintiff herein presents the foregoing as its bill of exceptions in the above-entitled cause and prays that the same may be settled, allowed, signed, and certified by the court and made a part of the record in said cause as provided by law.

CHAS. M. MORRIS,
United States Attorney,
EDWARD M. MORRISSEY,
Assistant United States Attorney,
J. K. SMITH,
Assistant United States Attorney,
Attorneys for Plaintiff.

The foregoing bill of exceptions may be settled, allowed, signed, and certified by the court as a bill of exceptions in the above-entitled cause.

JACOB EVANS,
Attorney for George A. Storrs.
M. E. WILSON,
DAN B. SHIELDS,
Attorneys for Joseph S. Welch, Earl J. Welch, and Charles M. Croft.

83 In United States District Court

Order settling bill of exceptions

The foregoing bill of exceptions contains all the evidence offered upon the hearing of the above entitled cause, together with correct copies of the exhibits offered and received at said hearing, and said bill of exceptions is correct in all respects and is hereby approved, allowed, settled and made a part of the record herein.

Dated this 23rd day of April, 1925.

TILLMAN D. JOHNSON,
Judge of the United States Court for the District of Utah.

[File endorsement omitted.]

In United States District Court

Petition for writ of error

Filed Apr. 23, 1925

84 And now comes the United States of America, plaintiff herein, and says:

That on the sixth day of March, in the year of our Lord nineteen hundred twenty-five, during the November, A. D. 1925, term of said court, the above mentioned District Court entered a judgment herein in favor of the defendants and against this plaintiff, in which judgment the said court sustained the pleas in abatement to the indictment in said cause, and thereafter, to-wit, on the eighth day of April, in the year of our Lord nineteen hundred twenty-five, during the said November, A. D. 1925, term of said court, the above-mentioned District Court entered a judgment herein in favor of the defendants and against this plaintiff, in which judgment the said court denied the petition of the plaintiff for a rehearing of the matters heretofore submitted to said court upon the said pleas in abatement filed by the said defendants and each of them to plaintiff's indictment in the above entitled cause and the demurrers of plaintiff interposed to said pleas in abatement, and in which said judgments and the proceedings had prior thereto in said cause,

85 certain errors were committed to the prejudice of this plaintiff, all of which will more fully appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

CHAS. M. MORRIS,
United States Attorney for the District of Utah,
EDWARD M. MORRISSEY,
Assistant United States Attorney for the District of Utah,
J. K. SMITH,
Assistant United States Attorney for the District of Utah,
Attorneys for Plaintiff.

Allowed, April 23, 1925.

TILLMAN D. JOHNSON,
Judge of the District Court of the United States for the District of Utah.

Copy of the foregoing petition received this 23 day of April, A. D. 1925.

JACOB EVANS,
Attorney for George A. Storrs.

Copy of the foregoing petition received this 23 day of April, A. D. 1925.

M. E. WILSON,
DAN B. SHIELDS,
Attorneys for Joseph S. Welch, Earl J. Welch, and Charles M. Croft.

86 In United States District Court

Assignments of error

Filed Apr. 23, 1925

The plaintiff in the above-entitled cause, in connection with the petition for a writ of error, makes the following assignment of errors, which the plaintiff avers exists, to wit:

1. That the court erred in denying plaintiff's petition for a rehearing of the matters submitted to the court upon the pleas in abatement filed by the defendants to plaintiff's indictment in said cause.

2. That the court erred in overruling the demurers interposed by plaintiff to the pleas in abatement filed in said cause by the defendants to plaintiff's indictment.

3. That the court erred in sustaining the pleas in abatement filed by the defendants to plaintiff's indictment in said cause.

4. That the court erred in entering judgment in favor of the defendants and each of them and against the plaintiff in the above-entitled cause.

87 Wherefore, plaintiff prays that the judgment of said District Court be reversed and that the pleas in abatement filed by the defendants and each of them be held for naught, and that the defendants and each of them be required to answer to the indictment on file in the above-entitled cause.

CHAS. M. MORRIS,
United States Attorney for the District of Utah,
EDWARD M. MORRISSEY,
Assistant United States Attorney for the District of Utah,
J. K. SMITH,
Assistant United States Attorney for the District of Utah,
Attorneys for Plaintiff.

Copy of the foregoing assignment of errors received this 23 day of April, 1925.

M. E. WILSON,
DAN B. SHIELDS,
Attorneys for Jos. S. Welch, E. J. Welch, and Chas. M. Croft.

Copy of the foregoing assignment of errors received this 23 day of April, 1925.

JACOB EVANS,
Attorney for George A. Storrs.

88 In United States District Court

[Title omitted.]

Order allowing writ of error

Filed Apr. 23, 1925

This 23 day of April, in the year of our Lord nineteen hundred twenty-five, comes the plaintiff and files herein and presents to the court, through its attorneys, plaintiff's petition praying for the allowance of a writ of error, and an assignment of errors intended to be urged by plaintiff, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the court does allow the writ of error; but plaintiff according to law is relieved from giving bond.

Done this 23 day of April, A. D. 1925.

TILLMAN D. JOHNSON,
Judge of the District Court of the United States for the District of Utah.

[File endorsement omitted.]

89 In United States District Court

Praecipe for transcript of record filed

April 23, 1925

The clerk of the above entitled court will prepare a transcript of record in the above entitled cause upon writ of error to the Supreme Court of the United States, and include therein the following:

1.
2. The indictment.
3. The arraignment and pleas.
4. Order to withdraw pleas of not guilty and leave granted to file pleas in abatement.
5. Pleas in abatement.
6.
7.
8. Judgment sustaining defendants' pleas in abatement.
9.
10. Order of court overruling defendants' objection to filing of plaintiff's petition for rehearing.

90 11.
12. Opinion of court sustaining pleas in abatement.

13. Bill of exceptions.
14. Petition for writ of error.
15. Assignment of errors.
16. Order allowing writ of error.
17. Writ of error.
18. Citation.
19. Judge's certificate.
20. Praecipe for transcript.
21. Clerk's certificate.

CHAS. M. MORRIS,
United States Attorney for the District of Utah.
EDWARD M. MORRISSEY,
Assistant United States Attorney for the District of Utah.
J. K. SMITH,
Assistant United States Attorney for the District of Utah.

Service of the within praecipe acknowledged this 23d day of April, 1925.

JACOB EVANS,
Attorney for George A. Storrs.
M. E. WILSON,
DAN B. SHIELDS,
Attorneys for Joseph S. Welch, Earl J. Welch, and Charles M. Croft.

[File endorsement omitted.]

91 In United States District Court

Judge's certificate

Filed April 23, 1925

In this cause I hereby certify that I sustained the pleas in abatement filed by the defendants to the indictment herein for the reasons and upon the grounds set forth in said pleas in abatement on file herein, and that I denied the petition of plaintiff for a rehearing in said cause for the same reasons and upon the same grounds, although, by reason of said judgment, the right of the plaintiff to prosecute further the offenses charged in said indictment will be lost and plaintiff will be barred from further prosecution of the defendants for said offenses as the Statute of Limitations will be operative.

This certificate is made a part of the record and will be certified and sent up as part of the proceedings.

Dated this 23d day of April, A. D. 1925.

TILLMAN D. JOHNSON,
Judge of the United States Court for the District of Utah.

[File endorsement omitted.]

92 In United States District Court

[Title omitted.]

Writ of error and return

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the Judge of the District Court of the United States for the District of Utah, greeting:

Because in the record and proceedings, and also in the rendition of the judgment on a plea which is in said District Court of the United States, District of Utah, before you, between the United States of America, plaintiff, and George A. Storrs, Joseph S. Welch, Earl J. Welch, and Charles M. Croft, defendants, a manifest error has happened to the great damage of the said plaintiff, as by its complaint appears, we being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to
93 the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington, on or before the seventh day of May next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 23 day of April, in the year of Our Lord, one thousand, nine hundred and twenty-five.

Issued at my office in the city of Salt Lake, State of Utah, with the seal of the District Court of the United States in and for the District of Utah, and dated as aforesaid.

[SEAL.] JOHN W. CHRISTY,
Clerk of the District Court of the United States in and for the District of Utah.

Allowed by:

TILLMAN D. JOHNSON,
Judge, District Court of the United States in and for the District of Utah.

UNITED STATES OF AMERICA,
District of Utah, ss:

In obedience to the command of the within writ, I herewith transmit to the United States Supreme Court, a duly certified transcript of the record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereto subscribe my name and affix the seal of the United States District Court for the District of Utah, at Salt Lake City, this 23rd day of April, 1925.

[SEAL.] JOHN W. CHRISTY,
Clerk, United States District Court, District of Utah.

94 [Citation in usual form showing service on Jacob Evans et al. omitted in printing.]

[Clerk's certificate to foregoing transcript omitted in printing.]

[Indorsement on cover:] File No. 31,109. Utah D. C. U. S. Term No. 95. The United States of America, plaintiff in error, vs. George A. Storrs, Joseph S. Welch, et al. Filed May 1st, 1925. File No. 31,109.

○

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AUTHORITIES CITED

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 95

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. Welch, and Charles M. Croft

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH

BRIEF ON BEHALF OF THE UNITED STATES IN OPPOSITION TO MOTION TO DISMISS WRIT OF ERROR

OPINION BELOW

The opinion below appears at R. 29, and the judge's certificate at R. 53.

STATEMENT OF THE CASE

On October 31, 1924, an indictment was filed in the United States District Court for the Central Division of the District of Utah against George A. Storrs, Joseph S. Welch, Earl J. Welch, and Charles M. Croft, defendants, charging them in the

first count with a conspiracy to violate Section 215 of the Federal Penal Code, and in the second, third, and fourth counts with violations thereof. The conspiracy was alleged to have continued from November 15, 1919, to March 15, 1923. The violations of Section 215 were alleged in the second, third, and fourth counts, respectively, to have occurred on or before November 29, 1921, December 7, 1921, and December 9, 1921. (R. 1, 18, 21, 22, 23.)

On November 15, 1924, *before* the three-year statute of limitations had run on the violations of Section 215, defendants pleaded not guilty. (R. 25.) On February 24, 1925, *after* the statute had run, defendants were permitted to withdraw their pleas of not guilty and to plead in abatement. (R. 25.) These pleas were sustained in a judgment filed March 6, 1925 (R. 31), pursuant to an opinion filed on the same day (R. 29). The effect of the judgment was finally to bar the United States from further prosecution of the violations of Section 215.

One week after the entry of judgment the Government filed in the District Court a petition for rehearing. (R. 31.) This petition was entertained by the court over objection of the defendants, but was determined against the Government thirty-three days after the entry of the original judgment. (R. 31.) Fifteen days after the denial of the petition for rehearing and forty-eight days after the original judgment the Government petitioned for (R. 50) and was granted (R. 52) a writ of error.

SUMMARY OF ARGUMENT

I. The judgment below sustaining the plea in abatement was in effect a bar to further prosecution because the statute had run. As such it came within the provision of the Criminal Appeals Act, and the Government is entitled to a writ of error. *United States* v. *Thompson,* 251 U. S. 407.

II. The writ of error was taken within thirty days after the denial of Government's petition for a rehearing, and was taken in time.

III. The writ of error should not be dismissed for want of diligent prosecution.

ARGUMENT

I

THE JUDGMENT BELOW BARRED FURTHER PROSECUTION, AND WAS THEREFORE A PLEA IN BAR WITHIN THE MEANING OF THE CRIMINAL APPEALS ACT

The order granting the plea in abatement was entered more than three years after the commission of the indictable acts set out in counts two, three, and four. By reason of the running of the statute of limitations a new indictment could not be sought. Act of November 17, 1921, c. 124 (42 Stat. 220). The effect of the order was therefore to completely bar further prosecution for the crimes set out in counts two, three, and four.

The defendants pleaded in abatement, but the court's order in fact barred further prosecution. The type of plea was dilatory, but the effect of the judgment was final. The Government therefore

maintains that the case falls within the provisions and intent of the Criminal Appeals Act that a defendant shall not escape prosecution through an erroneous judgment of a trial court rendered before he has been placed in jeopardy.

This Court has had occasion to construe the authorization by the Act of March 2, 1907, c. 2564 (34 Stat. 1246), of a writ of error " from [a] decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy," and has construed it with an eye not to form but to substance. *United States* v. *Barber,* 219 U. S. 72, 78; *United States* v. *Oppenheimer,* 242 U. S. 85. At page 87 of the opinion by Mr. Justice Holmes for the Court in the *Oppenheimer case* it is pointed out in regard to motions to quash and pleas in bar that "one judgment that he is free as matter of substantive law is as good as another."

The case of *United States* v. *Thompson,* 251 U. S. 407, is directly applicable to the case at bar. This Court sustained a writ of error to an order quashing an indictment on the ground that the grand jury proceedings had been irregular. A rehearing had been asked by the Government in the trial court, as in the case at bar, on the ground that the statute of limitations had already run. Upon denial of rehearing the writ of error was taken. The following quotation from the opinion of Chief Justice White is found at page 412, after citation of the *Barber* and *Oppenheimer cases:*

> Testing, then, the existence of jurisdiction by the substantial operation of the judgment * * * we are of opinion that the power to review the judgment is conferred by the provision of the statute quoted, (a) because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based * * *.

This is an express decision that, although the judgment below be not on a common-law plea in bar, it will constitute ground for a writ of error if its effect is in fact to bar further prosecution.

II

THE WRIT OF ERROR WAS TAKEN WITHIN THE TIME LIMIT ALLOWED BY STATUTE

The Act of March 2, 1907, requires that the writ of error shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases.

Some question has arisen whether Section 8(a) of the Act of February 13, 1925, c. 229 (43 Stat. 936, 940), providing that writs of error and appeals to this Court shall not be entertained unless taken within three months after entry of judgment operates to enlarge the time specified in the Criminal

Appeals Act and other statutes relating to special appeals, but the correct view is that Congress did not intend to enlarge the time, and we do not contend otherwise.

The judgment in the instant case was rendered on March 6, 1925. (R. 31.) On March 13, 1925, a petition for rehearing was filed. It was entertained by the court against the objection of the defendants, the court holding that it had power to entertain the petition. (R. 31, 32.) The trial court denied the petition on April 8, 1925. (R. 31–32.) The writ of error was allowed April 23, 1925. (R. 50.) The writ was therefore taken within thirty days after the denial of a rehearing, although not within thirty days after the original judgment.

Movant does not deny that the running of the time for the taking of an appeal after a judgment has been entered is suspended by the due and seasonable filing and consideration of a proper motion for a rehearing, even though the granting of such motion rests within the sound discretion of the trial court.

Andrews v. *Virginian Railway Co.*, 248 U. S. 272.

Southern Pacific Co. v. *United States*, 270 U. S. 103.

Morse v. *United States*, 270 U. S. 151.

Movant contends, however, that trial courts at common law have no authority to grant rehearings in any case. He concedes that rehearings may be granted by both trial and appellate courts in equity

and by appellate courts at law, and that new trials may be granted by trial courts at law.

The short answer is that even if the action of the court in entertaining the petition for rehearing was error, it was not void for want of jurisdiction. The court had power to decide whether a petition for rehearing could be considered and whether its action was right or wrong, the fact that the petition was received, entertained, and not decided until April 8, suspended meanwhile the right to sue out a writ of error.

By Section 918 of the Revised Statutes District Courts are to "regulate their own practice as may be necessary or convenient for the advancement of justice and the prevention of delays in proceedings." The reconsideration during the term of an order, which through possible error might result only in useless and dilatory appeal, seems well within "the advancement of justice and the prevention of delays in proceedings."

Trial courts have, in fact, entertained similar motions in the past. In *United States* v. *Thompson*, *supra*, the court had granted a motion to quash the indictment, which this Court later held to be a plea in bar, and—

> A rehearing was asked on the ground, among others, that if the allowance of the motion to quash were adhered to, the result would be to bar the right of the Government to further prosecute for the offenses charged. * * * The rehearing was denied. (251 U. S. at p. 411.)

No suggestion was made that the District Court was not within its rights in entertaining the application for rehearing.

III

THE CAUSE SHOULD NOT BE DISMISSED FOR WANT OF DILIGENT PROSECUTION

This writ of error was docketed May 1, 1925 (R. 55), the writ having been allowed April 23, 1925. (R. 50.)

The case has taken its regular course since that time. On July 1, 1926, in accordance with the usual practice, the United States, at the request of the clerk, furnished him a requisition for printing the record.

The contention of defendants is in substance that there is want of diligence in prosecution, because the United States did not move to advance the cause out of its regular turn. Rule 18, paragraph 4, states:

> Criminal cases may be advanced by leave of the court on motion of *either* party.

The Solicitor General at the beginning of the October, 1925, Term took steps to have all criminal cases expedited by having it determined as soon as docketed whether they should be advanced. On December 28, 1925, this case was referred by the Solicitor General to the proper division in the Department of Justice "to determine whether the Government has a good case and should proceed

with the appeal and, if so, to make recommendation as to whether a motion to advance should not be made." Owing to a defect in our "follow-up" system, since corrected, no report was made on this reference, and the oversight was not discovered until late in the last term, when it was concluded that as the case would be well up on the 1926 Calendar no motion to advance was desirable.

While there has been failure by the United States to take the proper steps to expedite the hearing in this case, a failure to move to advance is no reason for dismissing the writ of error.

Respectfully submitted.

WILLIAM D. MITCHELL,
Solicitor General.
WILLIAM J. DONOVAN,
Assistant to the Attorney General.
WILLIAM D. WHITNEY,
Special Assistant Attorney General.

OCTOBER, 1926.

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AUTHORITIES CITED

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OCTOBER TERM, 1926

No. 95

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR

v.

GEORGE A. STORRS, JOSEPH S. WELCH, ET AL.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH

BRIEF FOR THE UNITED STATES

PREVIOUS OPINIONS IN THE PRESENT CASE

The opinion of the District Court appears at R. 29.

GROUNDS OF JURISDICTION

The judgment of the District Court to be reviewed was one entered March 6, 1925, quashing the indictment. (R. 31.) A petition by the United States for rehearing was filed March 13, 1925 (R. 31), was entertained against the objection of the defendants, and was denied April 8, 1925 (R. 31). The writ of error was applied for April 23, 1925. (R. 50.) That the writ of error was applied for in time is shown in the brief for the United States opposing the motion to dismiss. Another question

treated in that brief is whether the case is one in which direct writ of error is permitted.

On October 31, 1924, an indictment was filed in the United States District Court for the Central Division of the District of Utah against George A. Storrs, Joseph S. Welch, Earl J. Welch, and Charles M. Croft, defendants, charging them in the first count with a conspiracy to violate Section 215 of the Federal Penal Code, and in the second, third, and fourth counts with violations thereof. The conspiracy was alleged to have continued from November 15, 1919, to March 15, 1923. The violations of Section 215 were alleged in the second, third, and fourth counts, respectively, to have occurred on or before November 29, 1921, December 7, 1921, and December 9, 1921. (R. 1, 18, 21, 22, 23.)

On November 15, 1924, *before* the three-year statute of limitations had run on the violations of Section 215, defendants pleaded not guilty. (R 25.) On February 24, 1925, *after* the statute had run, defendants were permitted to withdraw their pleas of not guilty and to plead in abatement. (R. 25.)

The effect of the judgment sustaining these pleas was finally to bar the United States from further prosecution of the violations of Section 215. The judge's certificate (R. 53) sets forth that "by reason of said judgment, the right of the plaintiff to prose-

cute further the offenses charged in said indictment will be lost and plaintiff will be barred from further prosecution of the defendants for said offenses as the Statute of Limitations will be operative." That this is so may be confirmed by the fact that the indictment was filed October 31, 1924 (R. 1), and by reference to the second, third, and fourth counts of the indictment (R. 18–24), which set forth schemes to defraud consummated, respectively, on or about November 29, 1921, December 7, 1921, and December 9, 1921, whereas the order quashing the indictment was entered on March 6, 1925, more than three years later.

Jurisdiction is therefore invoked under the Criminal Appeals Act, Act of March 2, 1907, Chapter 2564, 34 Statutes at Large, 1246, granting a writ of error to the United States "from the decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

Reference is made in support of the jurisdiction to *United States* v. *Thompson,* 251 U. S. 407, in which this Court allowed a writ of error to an order quashing an indictment on the ground that a second grand-jury proceeding had been without leave of court, and that no resubmission to the grand jury could be made without leave of the court. The following quotation from the opinion of Chief Justice White is found at page 412:

> This direct writ of error was then prosecuted under the Criminal Appeals Act of

March 2, 1907, c. 2564, 34 Stat. 1246, both parties agreeing, for the purposes of a motion to dismiss for want of jurisdiction, which we now consider, that under the circumstances here disclosed the authority to review must depend upon whether the quashing of the indictment was a "decision or judgment sustaining a special plea in bar, when the defendant has not been put in jeopardy."

As it is settled that this question is to be determined, not by form but by substance (*United States* v. *Barber,* 219 U. S. 72, 78; *United States* v. *Oppenheimer,* 242 U. S. 85), it follows that the fact that the ruling took the form of granting a motion to quash is negligible. Testing, then, the existence of jurisdiction by the substantial operation of the judgment, and assuming for the purpose of that test that the United States possessed the right to submit the indictment to the second grand jury without leave of court, which right was denied by the judgment below, we are of opinion that the power to review the judgment is conferred by the provision of the statute quoted, (*a*) because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based.

Here, further prosecution is barred by the statute of limitations; there further prosecution was prevented unless the court consented to resubmission. The case at bar is stronger than the *Thompson case.*

STATEMENT OF THE CASE

The four individual defendants in error were indicted in the United States District Court for the District of Utah for conspiracy to violate Section 215 of the Federal Penal Code, and for violation of that section by using the mails to defraud. They filed substantially identical pleas in abatement alleging—

(1) That one Garnett, though not a witness, had been present in the grand jury room, and

(2) That the district attorney at the close of the testimony before the grand jurors (*a*) restated and summarized some of the testimony which had been given, and (*b*) advised that any indictment if found must be against all of the defendants. (R. 25, 27.)

To these pleas the Government, by leave of court, demurred orally. (R. 32, 33.) The trial court suspended argument and decision of the demurrer pending the taking of evidence in support of the pleas. (R. 33.) Its judgment sustaining the pleas recited that the hearing had been held "upon the demurrers of the plaintiff, and upon the evidence introduced." (R. 31.)

It appeared at the hearing that Garnett was an attorney at law admitted to practice (R. 39), although he had not actually practiced law for twenty years, and that he had been appointed by the Attorney General to be a special assistant to the United States Attorney to assist in the conduct of the case, "including grand jury proceedings." (R. 43–47.) He did nothing in the grand jury room except take stenographic minutes (R. 34, 40), of which he retained one copy and gave one copy to the United States Attorney (R. 40.) One copy was later seen by a defendant in the hands of the Government auditors in the Courthouse. (R. 38.)

Only one grand juror was called as a witness by defendants in error. He testified that the district attorney "made a brief résumé of the salient points of the testimony that had been offered, at the request of the grand jurors" (R. 35), and that again, in response to an inquiry by the grand jurors, he stated that if an indictment was brought, it would have to be brought against all of the defendants (R. 36). The district attorney did not suggest the returning of an indictment at all. (R. 36, 37.)

SPECIFICATION OF ERROR

It is urged that the trial court erred in overruling the demurrers to the pleas, sustaining the pleas in abatement, and entering judgment against the plaintiff. (R. 51.)

SUMMARY OF ARGUMENT

The presence of Garnett in the Grand Jury Room was proper. He was an attorney at law specifically directed by the Attorney General to conduct grand jury proceedings.

The majority of Federal and State Courts have held it proper for a stenographer, even though not an attorney at law duly authorized to conduct grand jury proceedings, to be present in the grand jury room. This doctrine does no violence to the historical secrecy and independence of the grand jury.

The United States Attorney may summarize the evidence for the grand jury and may state what he believes to be the law.

ARGUMENT

I

THE PRESENCE OF GARNETT IN THE GRAND JURY ROOM WAS PROPER

The statute of June 30, 1906, chapter 3935, 34 Statutes at Large 816, provides:

> That the Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magis-

> trates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought.

This statute, to which no reference was made in the opinion of the lower court, disposes of this point. The stenographer was an attorney at law, specially appointed a special assistant to the United States Attorney and specifically directed to conduct grand-jury proceedings, and had taken the oath as such. The only possible objection to his presence would appear to be that he was not *conducting* a proceeding. But the assistant who sits beside the trial counsel to take notes is at least assisting in the conduct of a proceeding. It does not alter the situation if the assistant has the knack of writing rapidly—or stenographically. A court should not inquire, after an indictment, just what was done by every assistant district attorney before the grand jury.

II

A Stenographer May Take the Grand-Jury Minutes

FEDERAL DECISIONS

It has been the prevailing view of the lower Federal courts that a clerk or stenographer of the district attorney may properly attend grand-jury hearings and take notes, even though not an attorney appointed by the Attorney General. Justice

Nelson, of this Court, when sitting on circuit in the Northern District of New York in 1852, stated that—

> It is the uniform practice, in the federal and state courts, for the clerk and assistant of the district attorney to attend the grand jury, and assist in investigating the accusations presented before it. That has been the practice, to my knowledge, without question, ever since I have had any connection with the administration of criminal justice. * * * We cannot, at this late day, overturn a uniform practice that has been settled for so long a time. [*United States* v. *Reed*, 2 Blatchford, 435, Fed. Cas. No. 16,134 in 27 Fed. Cas. 727, 734.]

The practice which was general in 1852 is even more important to the administration of criminal justice in our day, when the complexity of crime makes it desirable that the district attorney should have the assistance in many cases of a clerk or stenographer. This was recognized by the Circuit Court of Appeals for the Second Circuit in *Wilson* v. *United States* (1916), 229 Fed. 344, 347, 348. The opinion recognizes "the sanction of secrecy which the common law has always given to proceedings before grand juries," but "we are satisfied that the preservation of an accurate record of the testimony submitted to a grand jury tends to advance the ends of justice," and to hold otherwise "would seem like a reverter to strict technicalities, overattention to which sometimes tends to

defeat rather than to advance the ends of justice." Accord:

> *United States* v. *Simmons* (1891, S. D. N. Y.), 46 Fed. 65;
>
> *United States* v. *Rockefeller* (1914, S. D. N. Y.), 221 Fed. 462;
>
> *United States* v. *Morse* (1922, S. D. N. Y.), 292 Fed. 273;
>
> Dictum in *United States* v. *Heinze* (1910, S. D. N. Y.), 177 Fed. 770.

A contrary view was taken in the Fifth Circuit in *Latham* v. *United States* (1915), 226 Fed. 420, a case which is distinguishable from the case at bar in that the stenographer was not an attorney appointed by the Attorney General. That compliance with the Act of 1906 might alter the situation was expressly recognized in the opinion, at p. 423, as also in *United States* v. *Rubin* (1914, D. C. Conn.), 218 Fed. 245, 250, in which Judge Thomas said:

> I find that this stenographer was not an attorney at law specially appointed by the Attorney General under any provision of law.

These cases may therefore be taken rather as authorities for the Government in the case at bar, without conceding the correctness of their view that the use of a stenographer as in the case at bar is justified only by his appointment under the Act of 1906.

The only remaining Circuit Court of Appeals which has considered the question—that of the

Sixth Circuit—follows the Second Circuit. *Wilkes* v. *United States* (1923), 291 Fed. 988, 992:

> We agree with the Circuit Court of Appeals for the Second Circuit that the preservation of an accurate record of the testimony submitted to the grand jury tends to advance the ends of justice * * *.

The obvious handicap to district attorneys in their prosecution of the criminal law under modern conditions may properly be considered. To overturn the rule prevailing in the majority of the Federal courts would be to take a step backward which would be justified only if the practice of employing a stenographer results in prejudicial injury to defendants. No charge of prejudice is or could be made in the present case. The propriety of the rule which excludes from the grand jury room unauthorized persons who take an active part in examining witnesses or influencing the jury is not questioned, but the distinction between such a case and this case is noted in *United States* v. *Heinze*, *supra*.

STATE AUTHORITIES

The weight of authority in the State courts also supports the doctrine that the presence of a stenographer in the grand-jury room to assist the prosecutor does not prejudice the defendant nor otherwise invalidate the indictment. Indictment sustained:

> *State* v. *Bates* (1897), 148 Ind. 610, 48 N. E. 2 (although State statute expressly pro-

vided that grand-jury clerk should take minutes).

State v. *Brewster* (1898), 70 Vt. 341, 40 Atl. 1037.

State v. *Sullivan* (1904), 110 Mo. App. 75, 84 S. W. 105.

Commonwealth v. *Hegedus* (1910), 44 Pa. Super. Ct. 157.

Porter v. *State* (1913), 72 Tex. Cr. R. 71, 160 S. W. 1194.

Richards v. *State* (1913), 108 Ark. 87, 157 S. W. 141 (although State statute provided that only the prosecuting attorney and witness might be present).

Indictment abated:

State v. *Bowman* (1897), 90 Maine, 363, 38 Atl. 331 (only State authority directly contrary to Government view; court's opinion cites no authorities).

Commonwealth v. *Berry* (1906), 29 Ky. Law. Rep. 234, 92 S. W. 936 (under State statute that no one except attorney for commonwealth and witness might be present; even then two judges *dissenting*).

State v. *Salmon* (1909), 216 Mo. 466, 115 S. W. 1106 (stenographer was also a witness for prosecution and remained to take minutes; distinguishable therefore from case at bar).

Discussion in the State courts turned chiefly on the question whether the principle of secrecy of grand jury proceedings required the exclusion of a government stenographer. The Indiana, Vermont, and Pennsylvania cases point out that this secrecy

is preserved for the benefit of the Government to prevent the danger of escape by the person being investigated, to secure freedom of deliberation to the grand jurors, and to prevent perjury. See also *State* v. *Wood* (1900), 112 Iowa, 484, 84 N. W. 503; *Little* v. *Commonwealth* (1874), 25 Grattan 921, 931; 1 *Chitty, Criminal Law,* 317; 1 *Greenleaf on Evidence* (16th Ed.), Sec. 252.

The principle of secrecy is entitled to respect but not to blind awe. It is to subserve, not to obstruct, the administration of justice. The admission of a stenographer to the grand-jury room during the taking of testimony serves the same ends. It may prove an effective deterrent of perjury. It does not interfere with the free deliberation of the grand jury. As the minutes are available only to the grand jury and the prosecution, it will not assist the party being investigated to escape. On the other hand, it aids materially in the proper and exact investigation of a long case and may serve as much to protect the accused as the State against perjury in the grand-jury room or misunderstanding of the evidence by the grand jurors. And after the finding of a true bill it makes available to the district attorney the results of the grand inquest in his district. The same rule which permits his attendance upon the grand jury should, for all practical purposes, allow him a record of the inquest. The modern rule is to exclude all those whose presence may prejudice the accused but to admit the mere scribe or stenographer, characterized in

United States v. *Heinze*, 177 Fed. at p. 772, as "necessary or convenient in the same way as is a piece of furniture."

III

The United States Attorney May Summarize the Evidence for the Grand Jury and May State What He Believes to Be the Law

The conduct of the district attorney before the grand jury is not mentioned in the opinion of the court below (R. 29), but as it is given as a ground of abatement in the pleas, it will be noticed in this brief. Each of the acts to which objection is made were done by the district attorney at the request of the grand jurors (R. 35–37). He summarized the evidence in "a very brief outline * * *, possibly didn't take more than three or four minutes." According to the memory of the only grand juror who testified, when the district attorney was asked by the grand jury, he expressed the opinion that all of the defendants should be indicted, or none. (R. 36.) He did not urge the indictment. (R. 36, 37.)

The statement of the district attorney could only have meant that if the evidence involved some of the defendants in the conspiracy or substantive offenses, it involved them all. Whether he was right or wrong is not disclosed, because the evidence before the grand jury is not here. For all that appears, he was right, and no prejudice resulted.

The proper limits of a district attorney's conduct before the grand jury have been developed by the lower Federal courts. The line is now drawn between urging an indictment or dominating the grand jury, on the one hand, and presenting the evidence, stating the case, and acting as impartial legal adviser on the other. This line is a practical one and should be confirmed. It protects the independence of the grand jury, but does not reduce the district attorney to the position of a mere automaton or require the grand jury to make constant trips to the courtroom for guidance. In *United States* v. *Mitchell* (1905, D. Oreg.), 136 Fed. 896, 907, it was said:

> The district attorney may explain both his case and his law to the jury.

So in *United States* v. *Cobban* (1904, D. Montana), 127 Fed. 713, 722:

> He stated the facts he expected to establish and explained the law applicable. * * * The prosecuting officer is presumed to be learned in the law. I deem it within his province to explain both his case and his law to the jury, but reserving always to the jury the right, when in doubt, to call upon the court.

We find in a recent opinion by Judge A. N. Hand in the Southern District of New York a practical reference to a summation of the evidence by the district attorney:

> What reasonable objection can be urged against allowing the man who has prepared the case to refresh the recollection of the grand jurors by summarizing the evidence taken, perhaps, over weeks or months, and reading from the minutes and giving them a list of the names of the persons charged with the crime? Any objection is really, if not ostensibly, based on the supposition that grand juries are devoid of all independence and prosecuting officers are either tyrannical or dishonest. [*Rintelen* v. *United States* (1916), 235 Fed. 787, 791.]

The contrast of conduct is represented by *United States* v. *Wells* (1908, D. Idaho), 163 Fed. 313, 319, in which the district attorney "without request * * * made an extended address in which he discussed the law and the facts, and several of the jurymen were frank enough to say that they understood the object to be the finding of an indictment against these defendants."

That the giving by the district attorney of mistaken advice is not misconduct, is indicated in *United States* v. *Haskell,* 169 Fed. 449, 451:

> At the close of the first case, the attorney for the government, at the instance of the grand jury, stated the law claimed by him to be applicable to the crime being investigated, and, it is contended, stated it inaccurately in some particulars. * * * It is not to be expected that any grand juror after the lapse of several months would be able to accurately repeat the propositions of

> law so stated with all of their qualifying phrases. But, if we are to assume an inadvertent error, this can not be magnified into misconduct.

It is submitted that this represents a sound viewpoint applicable to the present case. It is a necessary corollary of the district attorney's duty to advise the grand jury as to law that his advice may at times be mistaken.

Other authorities on the duty of the district attorney before the grand jury support these views:

> *Field's Charge to the Grand Jury* (1872, D. Calif.), 2 Sawyer 667, Fed. Cas. No. 18—255 in 30 Fed. Cas. 992, 993.
>
> *In re District Attorney* (1872, W. D. Tenn.), Cas. No. 3925 in 7 Fed. Cas. 745, 746.
>
> *Bishop's New Criminal Procedure* (2d Ed.), Sec. 861.

It is respectfully submitted that the judgment of the District Court should be reversed.

WILLIAM D. MITCHELL,
Solicitor General.

WILLIAM J. DONOVAN,
Assistant to the Attorney General.

WILLIAM D. WHITNEY,
Special Assistant to the Attorney General.

NOVEMBER, 1926.

(25)

MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

FOR CHARLES M. CROFT

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 95

THE UNITED STATES OF AMERICA, Plaintiff in Error.

vs.

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. WELCH and CHARLES M. CROFT, Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

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GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. WELCH and CHARLES M. CROFT, Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

MOTION TO DISMISS FOR CHARLES M. CROFT

And now comes the defendant Charles M. Croft, by his counsel, M. E. Wilson, Dan B. Shields and A. R. Barnes, and moves this court to dismiss and quash the writ of error herein, on the following grounds, to-wit:

1. That this court is without jurisdiction to review the decision or judgment made and entered by the United States District Court for the District of Utah in said action by means of a writ of error, because:

   A. Said writ of error is not authorized or allowed to the plaintiff in error by any law of the United States.

B. Said writ of error was not taken within thirty days after the decision or judgment had been rendered by the United States District Court.

2. Said writ of error has not been diligently prosecuted, in that it affirmatively appears from the record that the judgment or decision was rendered on March 6, 1925; that the writ of error was not taken until April 23, 1925; that the record was not filed in this court until May 1, 1925; that since said last named date the plaintiff in error has permitted said cause to remain in abeyance in this court; that the record in said cause was not printed until August 19, 1926.

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES,

Attorneys for defendant,
Charles M. Croft.

(31,109)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 95

THE UNITED STATES OF AMERICA, Plaintiff in Error.

vs.

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. WELCH and CHARLES M. CROFT, Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

FILED_____

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES,
Attorneys for Defendant in Error,
Charles M. Croft.

BRIEF ON MOTION TO DISMISS WRIT OF ERROR FOR CHARLES M. CROFT.

STATEMENT.

The Government brings error to reverse a judgment made and entered on March 6, 1925, by the United States District Court for the Central Division of the District of

Utah, abating an indictment theretofore found against the defendants above named.

The defendant Croft has made a motion to dismiss said writ of error on the grounds that said writ is not authorized by law; or if authorized, that it was not taken in time; or if authorized and taken in time, then it fails for want of diligence in its prosecution.

The United States District Court for the Central Division of the District of Utah has two terms in each year prescribed by law, as of the second Monday in April and as of the second Monday in November. (Judicial Code Section 109.)

The proceedings in the case at bar commenced in said Court in the April term of 1924 and continued during and through the November term of that year and ended in the April term of 1925.

Said proceedings may be summarized as follows:

PROCEEDINGS AT APRIL TERM, 1924.

October 31, 1924. Finding of Indictment.

Grand Jury returned indictment containing four counts against defendants. First count charged conspiracy. Other counts charged unlawful use of mails. Statutes alleged to have been violated. (U. S. Penal Code Sections 37 and 215.)

> (Neither the validity nor the construction of either of these sections was in any wise involved in the abatement proceedings.)

PROCEEDINGS AT NOVEMBER TERM, 1924.

February 24, 1925. Pleas in Abatement.

Defendants by special leave of court filed pleas in abatement on two grounds:

1. Unlawful presence of stenographer in grand jury room, taking testimony of witnesses in shorthand, and thereafter transcribing same, thereby violating the secrecy of the proceedings.

2. Unlawful interference with grand jury by District Attorney.

A. Summing up testimony in an address to the grand jury.

B. Unlawful presence of District Attorney during its deliberations and instructing grand jurors that they must indict all or none of the defendants.

February 25, 1925. Hearing of Pleas in Abatement.

Testimony taken. Not disputed that E. M. Garnett acted as stenographer; took testimony of witnesses in short-hand; dictated short-hand notes to typist who made transcripts of same for use by District Attorney and other officers of the Government.

Not disputed that District Attorney gave a resume of testimony in a brief address to the grand jury and after the grand jury had entered upon its deliberations, the District Attorney, at the request of some of the members of the grand jury, returned to the grand jury room and in answer to an interrogatory propounded by some one of the grand jurors instructed all of the grand jurors that they must indict all or none of the defendants.

March 6, 1925. Judgment Abating Indictment.

The court sustained pleas in abatement and quashed the indictment as to each of the defendants.

March 13, 1925. Petition of Government for Rehearing.

Government filed what it called a petition for rehearing, alleging in substance that the pleas in abatement should be reheard because new indictments would be barred by the statute of limitations.

(Defendants say that a petition for rehearing or even a motion for new trial was not authorized by any law of the United States in these abatement proceedings.)

April 8, 1925. Petition for Rehearing Denied.

Defendants objected to the court entertaining the petition for rehearing on the ground that there was no

authority of law for the same. Court over-ruled said objection and denied petition.

April 11, 1925. Last Day of November, 1924, Term.

April 13, 1925. First Day of April, 1925, Term.

PROCEEDINGS AT APRIL TERM, 1925.

April 23, 1925. Bill of Exceptions.

The court settled bill of exceptions proposed by Government; settlement was consented to by attorneys for all defendants. Consent was given April 23, 1925, after adjournment of November, 1924, term.

(The court had no power to settle bill at April, 1925, term, even though it was consented to. Exporters v. Butterworth, 258 U. S. 365; 66 L. Ed. 663.)

Bill contains:

1. Demurrer ore tenus of Government to the effect that pleas in abatement did not allege prejudice or injury to the defendants and were uncertain for want of allegations of fact as to prejudice.

2. All evidence offered by defendants and by Government.

3. Order of court settling bill of exceptions dated April 23, 1925.

April 23, 1925. Petition for Writ of Error.

The government filed its petition for writ of error reciting in substance that judgment was made and entered as aforesaid and praying for the writ of error herein. The court allowed said petition on April 23, 1925.

(Defendants say that this petition was not taken in time under Act of March 2, 1907. Judgment was entered March 6, 1925. Petition for rehearing not effective for the purpose of extending the thirty days prescribed.)

April 23, 1925. Assignments of Error.

Government served and filed assignments of error alleging in substance:

1. Error in denying petition for rehearing.
2. Error in over-ruling demurrer of Government.
3. Error in sustaining pleas in abatement.
4. Error in entering judgment in abatement.

April 23, 1925. Judge's Certificate.

Trial Court, at request of Government, certified that he sustained pleas in abatement "for the reasons and upon the grounds set forth in said pleas" and that he denied the petition for rehearing in said cause "for the same reasons and upon the same grounds although by reason of said judgment, the right of the plaintiff to prosecute further the offenses charged in said indictment will be lost and the plaintiff will be barred from further prosecution of the defendants for said offenses, as the statute of limitations will be operative". The court made an order that this certificate be made a part of the record. *Defendants did not consent thereto.*

(Defendants say that this certificate is not authorized by law. It cannot be considered by this court as a part of the record. Even if considered, it serves no function. The Trial Court might as well have certified that he declared the law regardless of the consequences of such declaration.)

April 23, 1925. Writ of Error and Return.

Issued by Clerk of District Court. Allowed by Trial Judge. Returnable May 7, 1925, instead of within sixty days from date as required by Statute.

April 23, 1925. Citation.

Served and filed. (Not set out in record.)

May 1, 1925. Case Docketed in this Court.

August 19, 1926. Record Printed and Filed in This Court.

(This fact not shown by printed record itself. Reference is made to the records of the clerk of this court. Delay by Government in prosecuting this writ of error appears without explanation or excuse.)

ARGUMENT.

Point One.

The Writ of Error is not Authorized by any Law of the United States.

Unless it comes within the terms of the Act of March 2, 1907, then the Government has no right of review.

Act of March 2, 1907.

> "That a writ of error may be taken by and on behalf of the United States from the district or circuit courts direct to the Supreme Court of the United States in all criminal cases, in the following instances, to-wit: From a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded. From a decision arresting a judgment of conviction for insufficiency of the indictment, where such decision is based upon the invalidity or construction of the statute upon which the indictment is founded. From the decision or judgment sustaining a special plea in bar, when defendant has not been put in jeopardy. The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases. Pending the prosecution and determination of the writ of error in the foregoing instances, the defendant shall be admitted to bail on his own recognizance: Provided, that no writ of error shall be taken by or allowed the United States in any case where there has been a verdict in favor of the defendant." 1909 Supl. Fed. Stats. Anno. 292.

BASIC STATUTES.

Section 37 of the Penal Code of the United States provides:

> "If two or more persons conspire either to commit any offense against the United States, or to de-

fraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

Section 215 of the Penal Code of the United States provides:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "saw-dust swindle", or "counterfeit-money fraud", or by dealing or pretending to deal in what is commonly called "green article", "green coin", "green goods", "bills", "paper goods", "spurious Treasury notes", "United States goods", "green cigars", or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any postoffice, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post-office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered

by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than one thousand dollars, or imprisoned not more than five years, or both."

The gist of the offense defined in Section 215 is the improper use of the mails. Such improper use is charged in counts 2, 3 and 4 of the indictment in the case at bar, and the offense of conspiracy defined by the above quoted Section 37 to violate Section 215 of the Federal Penal Code is charged in count 1 of said indictment.

It is alleged in said first count that the "defendants continuously throughout the period of time from about the 15th of November, 1919 to the 15th day of March, 1923, at Salt Lake City in Salt Lake County, in the State and Central Division of the District of Utah, and within the jurisdiction of this court, knowingly, willfully, unlawfully and feloniously have conspired to commit an offense of the United States of America, to-wit, to violate Section 215 of the Federal Penal Code." (R. I.)

From this language it can be seen that the Government was charging the continuous operation of a conspiracy to violate the law of the United States. The statute of limitations of three years could not have run against the charge contained in the first count until March 15, 1926.

The defendants did not plead any statute of limitations. In fact the defendants never even suggested such a defense. Whatever appears in this record relative to the statute of limitations was brought into the record by the Government after the judgment in abatement was made and entered.

The matter pleaded by the defendants in their pleas did not go to the merits of the case at all, either in form or substance. It did not attack the validity of either Section 37 or Section 215, above quoted, and it did not invoke a construction of either of said sections, either directly or indirectly.

The matter pleaded by the defendants in their pleas was strictly in abatement of the particular indictment before the court. It was to the effect that the particular indictmen had been illegally procured. It was not only designated

as a plea in abatement, but it was properly and legally so designated. In every case which the defendants cited in support of their contentions the question raised by the defendants was disposed of by the courts, either on a motion to quash or on a plea in abatement.

United States v. Edgerton; 80 Fed. 374.
(D. C. Montana. April 21, 1897.)

(Unauthorized person before grand jury. Motion to quash sustained.)

United States v. Rosenthal; 121 Fed. 863.
(C. C. N. Y. March 17, 1903.)

(Unauthorized person before grand jury. Motion to quash sustained.)

United States v. Heinze; 177 Fed. 770.
(C. C. N. Y. January 22, 1910.)

(Unauthorized person before grand jury. Motion to quash sustained.)

United States v. Rubin; 218 Fed. 245.
(D. C. Conn. October 27, 1914.)

(Unauthorized person before grand jury. Motion to quash sustained.)

United States v. Railway Company; 221 Fed. 683.
(D. C. Penn. March 12, 1915.)

(Unauthorized person before grand jury. Motion to quash sustained.)

Latham v. United States; 226 Fed. 420
141 C. C. A. 450.
(C. C. A. Fifth Circuit. October 4, 1915.)

(Stenographer present with grand jury. Motion to quash overruled by Trial Court. Sustained by Court of Appeals.)

These cases all hold that the matter pleaded by the defendants in the case at bar does not go to the merits of the offense charged but merely to the legal propriety of the particular indictment before the court.

May v. United States; 236 Fed. 495.
(C. C. A., Eighth Circuit, Sept. 4, 1916.)

> "The question whether a person not authorized appeared before the grand jury returning the indictment may be raised by motion to quash, although plea in abatement is the proper remedy in all cases of contested fact."

In view of the charges made in the pleas in abatement the counsel for defendants were justified in assuming that at least some of the facts charged would be disputed, and therefore pleas in abatement and not motions to quash were filed in accordance with the practice laid down by the Circuit Court of Appeals of the Eighth Circuit in the May case.

In the case of Wilkes v. United States, 291 Fed. 988, decided by the United States Circuit Court of Appeals for the Sixth Circuit June 29, 1923, the defendants pleaded "not guilty", and during the trial before the petit jury *upon the merits*, moved that they be discharged because of the alleged unauthorized presence of a stenographer before the grand jury. Of course that motion was overruled, as was a motion in arrest of judgment for the same reason.

This court thereafter denied an application for a writ of certiorari in the Wilkes case, 263 U. S. 716. (See comment of Trial Court in case at bar, R. 29.) Certainly no one ought to contend, and in the case at bar no one did contend, that the presence of a stenographer before a grand jury finding an indictment, whether legal or illegal, could affect either the guilt or innocence of the defendants in this case or in any other.

Byrne, Federal Criminal Procedure, Section 370.

> "The United States can have a writ of error when an indictment is quashed, or set aside, or a demurrer sustained, when such action is predicated on the construction or constitutionality of the statute. Outside the right granted by the above mentioned statute, the United States has no appeal in criminal cases."

(The author is referring to the Act of March 2, 1907.)

Again quoting from the same section, Mr. Byrne says:

> "Where it does not appear that the judgment sustaining the demurrer turned upon any controverted

construction of the statute, the Supreme Court is without jurisdiction under the Criminal Appeals Act. But where an indictment is quashed on a finding that facts alleged are not within the statute, the United States has an appeal. But where it does not appear on what ground an indictment has been dismissed, the writ of error will not be entertained."

These quotations from this author are made for convenience, and they state clearly the substance of the holdings of this court.

No decision of this court authorizes this writ of error. On account of the fact that the district attorney, during the course of the proceedings, cited United States v. Thompson, 251 U. S. 407, we anticipate that the Government predicates its right to a writ of error upon that decision. It was decided March 1, 1920. Mr. Chief Justice White rendered the opinion. Certain charges were made to one grand jury which failed to indict. The same charges were re-submitted to another grand jury without leave of court. The second grand jury found an indictment. And the trial court held that the submission to the first grand jury and the failure of that first jury to indict was a bar to a re-submission to the second grand jury, unless special leave of court for such re-submission was first had and obtained.

This court held that the decision of the trial court was reviewable in this court under the Act of March 2, 1907, because the plea of the defendants while in form a plea in abatement was in substance a plea in bar.

In the case at bar the trial court held merely that the indictment had been illegally obtained because of the unauthorized presence of a stenographer in the grand jury room during the taking of the testimony by the grand jury, and because of the misconduct of the United States District Attorney in summing up the evidence to the grand jury after the testimony had been taken, and because the United States District Attorney had interfered with the deliberations of the grand jury and improperly instructed that grand jury that it must indict all or none of these defendants.

It is submitted that the Thompson case, where a bar was set up and sustained by the trial court, and the case at

bar, where further prosecution was in no wise prevented by the trial court, have nothing whatsoever in common, so far as the question of the right to review is concerned.

It is true that a "petition for rehearing" was filed in the Thompson case, and that it was set up in that petition that the result of sustaining the motion to quash would be to bar the right to prosecute further in consequence of the statute of limitations. But the holding of this court was in no wise predicated upon anything that was averred in the petition for rehearing. The statute of limitations was not referred to by this court in discussing or deciding the Government's right to a review under the Act of March 2, 1907.

If the Thompson case is to be construed, as the Government in the case at bar would have it, then clearly the Thompson case is not sound and should be overruled, because if it were given the construction claimed by the Government in the case at bar it would in effect write into the Act of March 2, 1907, *the proviso "that this court may lawfully review all judgments that abate any criminal indictment where it appears that the statute of limitations will operate as a bar to further prosecution under a new indictment."* The merits of such a proviso may be admitted and yet its enactment is for the legislature and not for the court. Without such a proviso, then this court is without power to review.

It is submitted, however, that one cannot read either the briefs or the opinion in the Thompson case without coming to the conclusion that this court merely held that the defendants in the Thompson case set up a plea in bar against a re-submission to the second grand jury because a previous grand jury had ignored the charges contained in the indictment. The defendants in the Thompson case had not been in jeopardy. The substance of their plea was a special plea in bar against the indictment because the first grand jury had refused to indict.

While counsel for defendants in the Thompson case did not admit that the plea filed in that case was one in bar, even they did not contend that it was one in abatement, because they say:

"The defendant's motion to quash the indict-

ment was, strictly speaking, neither a plea in bar nor a plea in abatement." (Brief.)

Counsel for the Government contended in the Thompson case that the plea of the defendants in that case was one in bar but that it was an unlawful plea. (See briefs of counsel.)

The Act of March 2, 1907, has been strictly construed by this court. This court has refused to go behind its literal meaning.

United States v. Weissman, 266 U. S. 377;
69 L. Ed. 334.

In that case the trial court directed the trial jury to render a general verdict of "not guilty", because the indictment was invalid. This action of the trial court took place before any evidence had been offered, before even an opening statement had been made, and it was argued by the Government in this court that the judgment should be treated as in substance sustaining a demurrer to the indictment or quashing it. This court held that the trial court had jurisdiction, saying:

> "We stop at the point of jurisdiction, the want of it would be the only pretext that could be offered for going behind the literal meaning of the statute."

If there is any doubt about our previous contentions with reference to the Thompson case, in and so far as the presence of a stenographer in the grand jury room is concerned, that doubt is entirely removed when we come to look at the aspect of the case relative to the alleged misconduct of the district attorney. The matter pleaded relative to such misconduct is not matter going to the merits but purely in abatement.

State v. Ernster, 179 N. W. 640; 147 Minn. 81
(Supreme Court of Minnesota, Oct. 22, 1920.)

In this case a committee appeared before a grand jury and made statements as to investigations made by a former grand jury, and the Supreme Court of Minnesota held that the indictment should be quashed.

Attorney General v. Pelletier, 240 Mass. 624;
134 N. E. 407

"While it is the duty of the district attorney in appropriate instances to advise the grand jury concerning the law, he cannot lawfully go outside of the bounds of his own province, and cannot rightly attempt to influence them in the performance of their duties, express his own opinion, or make arguments, or justly state any facts which have no relevancy to the guilt or innocence of the person under inquiry, but which may have a tendency to influence the action of the the jury on other grounds."

It was further held that it was improper for the prosecuting officer to attempt to refresh the memory of the grand jurors regarding the evidence before a vote was taken. Quoting from the opinion:

"He (district attorney) cannot participate in the deliberations or express opinions on questions of fact or attempt in any way to influence the action. His duty is ended when he has laid before the grand jury the evidence and explained the meaning of the law. The weight and credibility of the evidence is wholly for the grand jury. He should refrain from expressing an opinion on the facts even if asked. The grand jury ought not to delay action upon cases heard by them until their memory has become so misty or blurred as to require a rehearsing of it from any one. For the district attorney to make such statement is to substitute his memory for recollection of the grand jurors and is to that extent to usurp their function. Such conduct on the part of a prosecuting attorney is as reprehensible as to offer direct advice concerning the issues depending for decision by the grand jury. It affords abundant opportunity for craftiness and insidious influence. It is subversive of fundamental principles of the grand jury procedure for the district attorney or his assistants thus to participate in its deliberations and discussions. Office and Duty of Grand Jurors by Davis, 20, 21; United States v. Wells (D. C.) 163 Fed. 313; United States v. Rintelen (D. C.) 235 Fed. 787; Le Barron v. State, 107 Miss. 663, 674, 65 South. 648; Commonwealth v. Bradney, 126 Pa. 199, 205, 17 Atl. 600; Maginnis

Case, 269 Pa. 186, 197, 198, 112 Atl. 555. See cases collected in 20 Cyc. 1338."

Clearly it was the duty of the trial court to prevent unlawful interference with the grand jury in its deliberations. We do not in any respect attack the good faith of the eminent district attorney in the case at bar, but we do say that the undisputed evidence shows that his conduct was unlawful, and, if such conduct is permitted in a district attorney acting in good faith, then, of course, it is permitted to every district attorney, even to such as was removed from office in the case of Attorney General v. Pelletier.

The mere fact that the trial court quashed the particular indictment on account of the misconduct of the district attorney in summing up the evidence and in instructing the grand jury that they must indict all or none, did not bar further prosecution of these defendants. Such misconduct merely abated the particular indictment. That and nothing more. For these reasons we submit that the writ of error is not authorized by any law of the United States.

Point Two.

The writ of error, even if authorized, was not taken within time.

The Act of March 2, 1907, requires that the writ of error shall be taken within thirty days after the decision or judgment has been rendered, and shall be diligently prosecuted and shall have precedence over all other cases.

The judgment in this case was rendered on March 6, 1925. (R. 31) The writ of error was not allowed until April 23, 1925. (R. 50) It is true that on March 13, 1925, a petition for rehearing was filed. It is true that the trial court overruled the objection of the defendants made upon the ground that there was no authority of law for such a petition, and then denied the petition on April 8, 1925. (R. 31-32.) The defendants contend that the application of the Government for the so-called "rehearing" was a nullity and that consequently it did not have the effect of extending the time within which a writ of error could be taken.

A rehearing, properly speaking, may be had in appellate proceedings in law or in equity, and a rehearing is also

authorized in trial courts in the equity practice, but it has never been authorized in trial courts in law cases.

New trials grew out of the English Common Law system of trial by jury. Neither new trials nor rehearings have ever been authorized in abatement proceedings. In some states new trials are grantable only in cases tried by jury, and in the federal courts new trials apply only to jury cases.

Revised Statutes, Sec. 726
U. S. Compiled Statutes, 1916, Sec. 1246.

This statute reads:

> "All of said courts shall have power to grant new trials in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law."

This was a part of the Judiciary Act of 1789. In 1919 there was added to it the following amendment:

> "On the hearing of any appeal, certiorari, writ of error or motion for new trial in any case, civil or criminal, the court shall give judgment after the examination of the entire record, without regard to technical errors, defects or exceptions not affecting the substantial rights of the parties."

Fed. Stat. Anno. Supp. 1919, p. 231
Chandler v. Thompson, 30 Fed. 38.

With reference to this statute it was said in the above case:

> "The statute conferring jurisdiction upon the federal courts to grant new trials expressly provides that such power should be exercised 'for reasons for which new trials have been usually granted in courts of law.' This provision applies only to jury trials and is directory to the courts, to be governed by the rules and principles of the common law."

If the Government intended, by its application for a "rehearing", to move for a new trial, then the defendants say that there has been no trial such as is a prerequisite

to a motion for a new trial. If that petition for rehearing was intended merely for the purpose of bringing into the case some matter entirely extraneous to the matters involved in the pleas in abatement, such as the statute of limitations, then it is submitted that it was wholly and entirely improper and cannot function to the extent of extending the thirty days prescribed by the Act of March 2, 1907.

Luke v. Coleman, 34 Utah 383; 113 Pac. 1023.

In the case just cited a motion for a new trial had been overruled by the district court and then the defeated party filed what he called "an application for a rehearing". By this means the plaintiff sought to suspend the finality of the judgment until the petition for rehearing was overruled. The Supreme Court of Utah held:

> "We think the district court had not the power to entertain such a motion. It is unknown to our practice."

The Supreme Court of Utah quoted from the California Supreme Court as follows:

> "The foundation of this rule is that the modes in which a decision may be reviewed are prescribed by statute, and the courts are not at liberty to substitute other modes in their places."

Carpenter v. Superior Court, 75 Cal. 596; 19 Pac. 174

Montgomery-Ward v. Banque of Belge, 298 Fed. 446

The Circuit Court of Appeals of the Ninth Circuit says:

> "It is questionable, at least, whether such a motion, filed for such a purpose, would suspend the time for suing out a writ of error. If the contention is sound, a litigant in the court below may file a motion for new trial at any time before the expiration of a year from final judgment, or six months after the expiration of the time allowed by law for suing out a writ of error from this court."

If the procedure adopted by the Government in the case at bar is authorized, then a plea in abatement may be heard before the court at the commencement of a term, and if that

plea is sustained, the Government may file a petition for rehearing, socalled, at any time during the term, which ordinarily lasts six months, and thereby keep the prosecution pending, without in any manner presenting the questions involved to this court by means of a writ of error.

Suppose a plea in abatement or motion to quash is denied and the defendant is thereafter tried and convicted. As we understand it, it is settled law that while the defendant may review the ruling of the trial court in overruling the motion to quash or in denying the plea in abatement, still the defendant cannot raise such a question on a motion for new trial. The defendant's only remedy is by means of a writ of error to the proper appellate court, for the reason that of necessity there can be no new trial because of errors made in refusing to quash an indictment, which is the basis of the first trial. If the indictment is invalid there never could be a trial. Consequently, there could be no "*new trial.*"

Even if this is regarded as a "rehearing", the action of the court on such a "rehearing" is not reviewable on appeal.

Iron Company v. Toledo, 62 Fed. 169

McLeod v. New Albany, 66 Fed. 379

These cases, and those cited in the opinions of such cases, make it clear that a petition for rehearing in equity is not founded in matter of right, but is addressed to the sound discretion of the Court, and the exercise of that discretion cannot be assigned as error.

> (What becomes of the Government's assignment of error that the Court erred in denying the plaintiff's petition for rehearing?)

For these reasons we submit that the writ of error, even if authorized, was not taken within the time prescribed by the Act of March 2, 1907.

Point Three.

Writ of error fails for want of diligence in prosecution.

Upon this point little need be said. The record presents an open violation of the terms of the Act of March 2, 1907.

That Act requires a writ of error within thirty days. It expressly provides for diligence in prosecution and that the case shall have precedence over all other cases, and yet, although this case was docketed in this court on May 1, 1925, the Government has seen fit to allow the cause to remain in abeyance until August 19, 1926. Sub-division 9 of Rule 10 of this Court provided:

> "The plaintiff in error or appellant may, within ninety days after filing the record in this court, file with the clerk a statement of the errors on which he intends to rely and of the parts of the records which he thinks necessary for the consideration thereof, with proof of service of the same on the adverse party."

This praecipe was required as a guide to the clerk of this court in printing the record. No such praecipe was ever served upon the defendants. Sub-division 9 of Rule 11 of this Court now requires such a praecipe either at the time the record is filed or within fifteen days thereafter. This new rule has been effective since July 1, 1925.

The defendants submit that the writ of error fails for want of prosecution.

Point Four.

This Court cannot consider, as a part of the record, the Judge's certificate. (R. 53.)

This certificate was made by the trial court at the April term, 1925, without the consent of the defendants. The trial court had no power to make the certificate. It amounts to nothing in any event. It in effect says that the trial court sustained the pleas in abatement on the grounds set forth therein, although the statute of limitations will be operative as against any further prosecution. If these pleas in abatement were properly sustained, then, of course, the mere fact that the statute of limitations had run against new prosecutions need not have concerned the trial court any further than to make him exceedingly careful. This writ of error does not seek to review the recital contained in the certificate. It is nothing more than a recital. The trial court had no power to hold that the statute of limitations

had run against a further prosecution of the offenses charged in the indictment, because such power was never invoked. As a matter of fact, an examination of the first count, charging conspiracy, to our minds shows that the statute of limitations could not have run against such charge until March, 1926. The conspiracy charged was a continuing one, and continued, according to the allegations of the first count, until the fifteenth day of March, 1923. Applying the three year statute, it seems clear that the recital contained in the Judge's certificate was not true. Whether true or untrue, such a recital was a mere gratuity which the defendants were not bound to accept. Such a gratuity "bindeth none, not even the lips that utter it," it cannot serve to give a review in this court when no review is authorized by law.

For these reasons it is respectfully submitted that the writ of error should be dismissed.

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES,
Attorneys for defendant,
Charles M. Croft.

(31,109)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 95

THE UNITED STATES OF AMERICA, Plaintiff in Error.

vs.

GEORGE A. STORRS, JOSEPH S. WELCH, EARL J. WELCH and CHARLES M. CROFT, Defendants in Error.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF UTAH.

NOTICE OF SUBMISSION OF MOTION OF CHARLES M. CROFT.

To the Clerk of the United States Supreme Court:
To the United States of America, and the Honorable Attorney General of the United States, and the Honorable United States District Attorney for the District of Utah, Attorneys for Plaintiff in Error:

Please take notice that on Monday, October 18, 1926, at the opening of the court, or as soon thereafter as counsel can be heard, the motion to dismiss, a copy of which is

printed herein, together with the brief in support thereof printed herein, will be submitted to the Supreme Court of the United States for the decision of said Court thereon.

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES,

Attorneys for Charles M. Croft,
Defendant in Error.

Received copy of this Notice, together with motion and brief in support thereof.

.....

.....

.....

Attorneys for United States of America.

In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 95

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

GEORGE A. STORRS, JOSEPH S. WELCH,
EARL J. WELCH and CHARLES M. CROFT,
Defendants in Error.

Brief of Defendant in Error, Charles M. Croft

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF UTAH.

MAHLON E. WILSON,
DAN B. SHIELDS,
ALBERT R. BARNES.
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Charles M. Croft

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In the Supreme Court of the United States

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No. 95

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EARL J. WELCH and CHARLES M. CROFT,
Defendants in Error.

Brief of Defendant in Error, Charles M. Croft

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF UTAH.

DEFENDANT'S STATEMENT.

This defendant will be unable to have his contentions orally presented to this Court by counsel, and he is informed that a like inability exists as to the other defendants. If his information in this regard is correct, then he must rely wholly upon his briefs.

REPLY ON MOTION TO DISMISS.

This defendant has contended and still contends that the writ of error in this case should be dismissed on three grounds:

1. That said writ of error is not allowed or authorized by any law of the United States.

2. That said writ of error was not taken within thirty days after the decision or judgment had been rendered by the United States District Court.

3. That said writ of error has not been diligently prosecuted by the Government.

WRIT OF ERROR NOT ALLOWED TO THE GOVERNMENT.

It is conceded, as it must be, that unless this writ comes within the terms of the Act of March 2, 1907, the Government has no right of review. The one authority relied upon by counsel for the Government is the case, United States v. Thompson, 251 U. S. 407.

This defendant has already explained his construction of that case, but the Government in its briefs contends that the case cited is in point and quotes the language of Mr. Chief Justice White in support of its contention. This defendant submits that such language does not justify the contention of the Government, but, on the contrary, makes clear the validity of the contention of this defendant.

In the Thompson case the plea made by the defendant was one in bar where the defendant had not been put in jeopardy. The plea made in the Thompson case was that the Government could not make a second submission of any given matter to a grand jury without first obtaining leave of court for such resubmission. This plea necessarily placed a limitation upon the right of the Government and this plea, when sustained by the Trial Court, was in effect a bar to further prosecution until such leave of court had been obtained. It is submitted that such a limitation (and we are not in any wise referring to the statute of limitations) had in and of itself the effect of a bar. That is the Thompson case, and the language of Mr. Justice White, quoted on Page 4 of the second brief of the Government, cannot be construed otherwise than this defendant contends. That language is:

> "(a) because its necessary effect was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this

indictment, but as to all subsequent ones for the same offenses, to a *limitation* resulting from the exercise of the judicial power upon which the judgment was based;" (This is a quotation from the opinion and this portion is quoted in the Government's brief.)

But the opinion of Mr. Justice White proceeds as follows:

> "and (b) because a like consequence resulted as to the authority of the district attorney and the powers of the grand jury since the exercise in both cases of lawful authority was barred by the application of unauthorized judicial discretion."

The writer of this brief has italicised the word "limitation." It is unnecessary to say that such word does not in any wise refer to the statute of limitations. It refers only to the application of "an unauthorized judicial discretion."

One can readily see that this bar referred to by Mr. Chief Justice White was in the plea made by the defendant in the Thompson case. In the case being presented the bar, if bar there is or was, did not arise from the plea made by Croft or any of the other defendants, but it arose from some fact that was entirely independent of the matters in abatement set-up by Croft, i. e., stating it broadly and assuming for the purpose of argument everything against this defendant, lapse of time had caused the statute of limitations to function and operate.

It is true that the Government did file a petition for rehearing in the Thompson case and did set-up in that petition for rehearing that the statute of limitations would be operative against any further prosecution. These facts appear from the opinion of Mr. Justice White, but the time when this petition for rehearing was filed or the time when it was overruled do not appear from the opinion in the Thompson case and whether the petition for rehearing was overruled and the writ of error taken within the thirty days from the rendition of judgment in abatement is not disclosed by the opinion, and then again, Mr. Justice White, in the opinion of the Court, gives no apparent effect to the matters set forth in the petition for rehearing relative to the statute of limita-

tions. The decision of this Court in the Thompson case was not in any wise affected by the matters set forth in the petition for rehearing in that case. The decision turned upon and rests upon the fact that the plea made by Thompson was a plea in bar without regard to the statute of limitations. It is unnecessary to say that no court will make a judicial construction of a statute that in effect amends it.

It is submitted by this defendant that the construction contended for by the Government in the instant case in effect amends the statute known as the Act of March 2, 1907, so that the Government may have a review of every judgment that abates an indictment, if the statute of limitations has run against a new indictment.

It is pointed out in the brief of the Government that the plea in abatement in the instant case was made "*after*" the statute of limitations had run. This defendant does not concede the statement of the Government as to the first count in the indictment because that count plainly alleges that the defendants "continuously throughout the period of time from the fifteenth day of November, 1919, to the fifteenth day of March, 1923, * * * conspired, combined, confederated and agreed together." Is not this allegation to have force as against the Government?

But even if this construction of the indictment is unsound, still this defendant submits that the discussion is wholly irrelevant and cannot aid the Governmnet in this court in sustaining this writ of error, because it will be noticed from the record that on February 24, 1925, the Trial Court permitted the defendants to withdraw their pleas of not guilty and to file their pleas in abatement. (R. 25) Nothing can be found in the record that shows that the Government in any wise objected to this order of the Court. Silence gives consent . Therefore, the consent of the Government may be presumed as to this order.

If the Government had appeared and objected and shown to the Court that the statute of limitations had run against a new indictment, then perhaps the Trial Court would not have allowed the defendants to withdraw their pleas of not guilty, and would not have allowed those defendants to file their pleas in abatement. This was the point where the Government should have pointed out to the Trial Court that

the statute of limitations would operate as to any new indictment in favor of the defendants and against the Government. Raising such a question then would have been proceeding according to authorized and lawful judicial procedure. An attempt to raise it after the judgment in abatement had been entered by a petition for rehearing, so-called, was not authorized by the law. Neither the Government nor the defendant should be permitted, either expressly or impliedly, to invite error.

Whether the statute of limitations has run or not cannot alter the effect of the Act of March 2, 1907. Pleas are to be construed according to their substance rather than their form, but this substance must be obtained from the pleas themselves—not from some matter in pais or from some extraneous circumstance or from some independent fact.

It is therefore submitted that this writ of error is not authorized by either the Act of March 2, 1907, or by any other law of the United States.

WRIT OF ERROR NOT WITHIN TIME.

The Act of March 2, 1907, says:

> "The writ of error in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted and shall have precedence over all other cases."

It is perfectly clear that the procedure relative to motions to advance is wholly unnecessary to writs of error taken under such a statute, because the statute itself gives the cases brought to this Court under the Act precedence over all other cases.

The judgment in abatement was entered on March 6, 1925. (R. 31) It was a general judgment. No findings of fact were requested apparently by either party, and that judgment operates as a conclusive determination of all facts necessary to its existence. One may not come into this court and undertake to review facts in order to reverse such a judgment, unless some motion has been made directing the Court's attention to the particular point that the complaining party desires to raise. This rule, it is believed, operates in all Federal Courts.

The so-called "petition for rehearing" is not set out in the record. (R. 31) It was filed on March 13, 1925. (R. 31).

The defendants then appeared and objected to said petition being entertained by the Court on the ground that there is no authority of law for the same. (R. 32)

This objection made by the defendants went to the jurisdiction of the Trial Court to entertain the petition, and it is submitted that the Trial Court could not give itself jurisdiction by erroneously ruling that it had jurisdiction. If the petition for rehearing was unauthorized by the law, then it was void, and the mere fact that the Court entertained a void petition for rehearing cannot give life to such a petition. If the Court had no power to entertain it, then it could be entertained time and time again without legal effect. A void, nonexistent proceeding cannot obtain life and validity from erroneous ruling.

But it is said in the Government's brief, in answer to the motion to dismiss, that even if the action of the Court in entertaining the petition for rehearing was error, it was not void for want of jurisdiction. (Government Brief P. 7) This defendant challenges such a contention. It is unsound in every particular. The Court could not give itself jurisdiction by entertaining a void and unauthorized petition. No person can lift himself even a fraction of an inch from the earth's surface by means of direct action.

But this is hardly the question. It is in effect said in the brief of the Government that the Court had power to modify the judgment in abatement. Perhaps it did have such power at any time during the term at which the judgment was rendered. For the purpose of argument let us assume that fact. Let us assume that the Trial Court could have set this judgment in abatement aside on its own motion at any time during the November term at which it was rendered, and for that reason it could have entertained the unauthorized petition for rehearing and set the judgment in abatement aside.

Does it follow from this assumption that the Government could extend the thirty days allowed for the writ of error in the Act of March 2, 1907, by filing this petition for rehearing and having the Trial Court entertain that petition? *No such*

procedure can extend the thirty days allowed by the statute. The terms of the United States District Court for the District of Utah, for convenience, last six months. A judgment in abatement may be obtained at the commencement of any term, and when obtained thirty, sixty or ninety days may elapse after the entry of such judgment. Then, according to the effect of the Government's contentions on this motion, the Government may allow the thirty days (the time permitted by the statute) to expire and revive that time by filing a petition for rehearing on the last day of the term, at which the judgment was rendered. This, it is submitted, is violating the express provision of the Act of March 2, 1907, which allows only thirty days for the taking of the writ of error.

In order to justify the contention of the Government made upon this phase of the motion the statute should read that the writ of error may be taken at any time during the term at which the judgment in abatement was rendered, and perhaps a party could then take the writ of error at some subsequent term by merely filing the petition for rehearing during the term of rendition and having it continued over into the next term and heard at that term. This was not the intention of Congress when it passed the Act of March 2, 1907.

See Montgomery-Ward Co. v. Banque, 298 Fed. 448.

In this case the Ninth Circuit Court of Appeals said:

> "If a motion for a new trial or petition for rehearing is presented in season and entertained by the Court the time allowed for writ of error or appeal does not begin to run until the motion or petition is disposed of."

Can any such a rule as that just quoted apply to the Act of March 2, 1907? No motion for new trial or petition for rehearing was authorized in the case at bar.

Please note the language of Mr. Circuit Judge Rudkin in the above case:

> "It is questionable, at least, whether such a motion, filed for such a purpose, would suspend the time for suing out a writ of error. If the contention is sound, a litigant in the court below may file a motion

> for a new trial at any time before the expiration of a year from final judgment, or six months after the expiration of the time allowed by law for suing out a writ of error from this court."

In the case cited from the Ninth Circuit it appears that the Trial Court found that the motion was made as an afterthought, because it had been discovered that the time for super sedeas had expired. In the case before this Court it appears that no such petition for rehearing was authorized. To the mind of the writer it does not make any difference whether the Trial Court had power to set the judgment aside or not. Even if the existence of such power is assumed the Government could not extend the thirty days prescribed by the statute by any such means as was adopted in the case at bar.

It is therefore submitted that this motion should be sustained on the ground that the writ of error was not taken within the thirty days allowed by statute.

WANT OF DILIGENCE.

The want of diligence in prosecuting this writ of error is apparent. It arises at the very outset of the attempted proceedings. First, the Government filed a petition for rehearing. Second, the Government had its bill of exceptions settled after the expiration of the term at which the judgment was entered when the Court had no power to settle that bill.

Exporters v. Butterworth, 258 U. S. 365;
66 L. Ed. 663

In the case cited, Mr. Justice McReynolds, speaking for a unanimous court, said:

> "Consent of parties cannot give jurisdiction to the courts of the United States (citing authority). The policy of the law requires that litigation be terminated within a reasonable time and not protracted at the mere option of the parties."

The bill of exceptions was void, even though settled pursuant to stipulation of counsel. The certificate of the Trial Judge is no part of the record. It is unauthorized by law.

In the next place, this case was docketed in this court

May 1, 1925. Under the Act of March 2, 1907, if it is controlled by that Act, the case should have been diligently prosecuted and it had precedence over all other cases. No motion to advance it was necessary. The Government was the actor. The statute under which the writ of error was attempted prescribed the duty of the person prosecuting, and yet on Page 8 of the Government's brief in answer to the motion to dismiss it is said:

> "The case has taken its regular course since that time. On July 1, 1926, in accordance with the usual practice, the United States, at the request of the clerk, furnished him a requisition for printing the record."

If the course taken by the Government in the prosecution of this writ was "regular", it certainly was not in accord with the Act by which the Government seeks to justify the taking of the writ. One year and several months intervened before the Government furnished the clerk a requisition for printing this record, and this it apparently did at the request of the clerk.

This defendant is not complaining because the Government did not make a motion to advance, but this defendant is complaining because the Government did not prosecute with diligence and did not comply with the terms of the very Act which the Government claims authorizes the writ. This defendant has been on his own recognizance since the judgment in abatement was rendered. One year and many months have intervened since the rendition of that judgment. He surely is not to be charged with defects in the "follow-up" system of the Solicitor General referred to on Page 9 of the Government's brief.

It is therefore submitted that this motion to dismiss should be sustained because of the laches of the Government, which laches is condemned by the Act of March 2, 1907.

ON THE MERITS.

This defendant objects to a consideration of the bill of exceptions appearing on pages 32-49, inclusive, of the record, on the ground that such bill of exceptions was settled by the Trial Court when that Court had no power to settle or allow such bill.

Exporters v. Butterworth, 258 U. S. 365;
66 L. Ed. 663.

In support of this objection this defendant calls the attention of the Court to the record that the judgment in abatement was rendered on March 6, 1925, (R. 31); that the so-called petition for rehearing was overruled on April 8, 1925. (R. 31.) This was during the November, 1924, term of the Trial Court. April 13, 1925, was the first day of the April, 1925, term. (Judicial Code Section 109.) April 13, 1925, was the second Monday in April of that year. For the reasons set forth in the Butterworth case the Trial Court was without power or jurisdiction to settle the bill of exceptions and therefore the bill must be eliminated.

This defendant makes the same contention to that paper which is entitled, "Judge's Certificate". (R. 53.) It will be noticed that this certificate was not consented to; that it was not made a part of the bill of exceptions; that it brought in matters that were foreign to any proceedings theretofore had in the case. It serves no function. It is void.

If the bill of exceptions is eliminated then there is nothing before the Court but the plea in abatement. If the plea in abatement is good as against demurrer, that ends this proceeding.

Apparently such a thought was possessed by the writer of the Government's brief on the merits, because he sets out only one specification of error, reading as follows:

> "It is urged that the Trial Court erred in overruling the demurrers to the pleas, sustaining the pleas in abatement and entering judgment against the plaintiff." (Government Brief, Page 6.)

It is true that in his argument he undertakes to set forth facts which can be shown to exist only by means of the bill of exceptions. Whether counsel for the Government concede the construction placed upon its specification in error or not, the defendant contends that the only thing which this Court can consider is whether the Trial Court erred in overruling the demurrer of the Government to the defendant's plea in abatement, *and it cannot consider that.* That would be Assignment of Error Number 2 (R. 51). There are four assignments of error. The first assigns error of the Trial Court in denying the plaintiff's petition for rehearing. This, of course, cannot be considered. The third assigns error on

the part of the Trial Court in sustaining the pleas in abatement. It is submitted that such an assignment is insufficient even if the bill of exceptions is not eliminated. Surely it is insufficient with the bill of exceptions eliminated. The Government did not make any request for any findings of fact or for any declarations of law. The attention of the Trial Court was not challenged or directed to any particular point made by the Government. This Court cannot be required to go through the bill of exceptions and *find* some error of the Trial Court, and if this Court is not required to do that, then the assignment is without function.

Assignment No. 4 avers that the Trial Court erred in entering judgment in favor of the defendants. Such a general assignment does not invoke this Court's jurisdiction on a writ of error.

The only remaining assignment is No. 2; that the Court erred in overruling the demurrers interposed by the Government. (R. 51.)

It is true no bill of exceptions would be necessary to test the sufficiency of the pleas as against the demurrer, but the demurrer does not appear except in the bill of exceptions and without the bill of exceptions it cannot be known that the Government demurred, *consequently there is nothing before this Court for review.*

It may be that these contentions are technical, but it seems to the writer that they are sound and that the defendant is entitled to have them made and sustained. The defendant, however, contends that the plea in abatement is, in all respects, sufficient as against demurrer.

DEMURRER PROPERLY OVERRULED.

The plea alleges in substance that Edward M. Garnett and other persons, not members of the grand jury and not lawfully authorized to be and remain with said grand jurors while they were conducting their inquiry, were present with said grand jurors while they were examining the matter of presenting said indictment. It further alleges that Edward M. Garnett was not authorized or appointed in any manner or at all to assist the United States District Attorney in conducting said proceedings. It alleges in substance the presence

of a person who was not a District Attorney representing the United States nor a witness in said cause nor authorized by law to be present. It also alleges that the United States District Attorney substituted his own recollection of the testimony taken for that of the grand jurors and that the United States District Attorney advised the grand jurors that an indictment, if found, must be against all of the defendants. No authority cited by the Government in its brief sustains any indictment as against such an attack.

Neither the United States District Attorney nor any other person can substitute his recollection for that of a grand jury. If this indictment is predicated upon the recollection of the District Attorney and not upon that of the grand jury, then the District Attorney found the indictment and the endorsement of the grand jury that it was a true bill, means nothing.

It is, therefore, submitted that the judgment must be affirmed without giving any consideration to the contentions made by the Government in its brief.

CONTENTIONS OF GOVERNMENT UNSOUND AND PRESENCE OF GARNETT IN GRAND JURY ROOM WAS UNLAWFUL.

The Government cites the Statute of June 30, 1906. (34 Stat. L. 816.) That statute reads:

> "That the Attorney General or any officer of the Department of Justice, or any attorney or counselor specially appointed by the Attorney General under any provision of law, may, when thereunto specifically directed by the Attorney-General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which district attorneys now are or hereafter may be by law authorized to conduct, whether or not he or they be residents of the district in which such proceeding is brought. (34 Stat. L. 816.)

The Government in its brief says no reference was made to the Statute in the opinion of the Trial Court. The statement contained in the brief of the Government is true in and

so far as the opinion is concerned, except that the Trial Court does use the following language:

> "The distinguishing characteristic of the grand jury system which justified its existence in the past, and, aside from the requirements of the Constitution which justifies its continuance in the future, should not be jeopardized by any strained statutory construction or arbitrary judicial pronouncement in the interest of convenience to government prosecuting or investigating officers."

The words "statutory construction" refer to the identical statute quoted by the Attorney-General. The able District Attorney as well as counsel for defendants presented this statute to the Trial Court, and its citation in the Government's brief is not, in any sense, a surprise. The Trial Court seemed to think that this statute was not intended by Congress to serve the purpose which the Government undertook to make it serve in the case at bar; and that the Government was attempting to make a strained construction of the language used in the section quoted.

It appears from the bill of exceptions that Edward M. Garnett was the acting reporter of the United States Court (R. 39); that there is no official reporter in such a court except in equity cases; that in all other matters he has acted as such reporter; that he was admitted to the bar of the Supreme Court of the State of Utah and to the Federal Court; that he was not practicing law; that he had not practiced law for twenty years; that he was not practicing law at the time the grand jury held its grand inquest in the case at bar (R. 39); that he was not acting as an attorney in the grand jury room; that he took down in shorthand the testimony of the witnesses given before the grand jury; that he transcribed it into typewriting or had it transcribed under his direction; that possibly two different persons took part in transcribing the testimony (R. 40); that he received Ten Dollars per day and Forty-five cents a page for the transcript (R. 49). The Court judicially knew that that was the usual court reporter fee.

Now, from this testimony it can be seen that Garnett was not conducting any legal proceeding before the grand jury; that he was not acting as a district attorney or an assist-

ant to such district attorney in conducting any proceeding and the alleged appointment made by the Attorney-General of Garnett was never acted upon by Garnett. This statute was passed for the purpose of allowing non-resident attorneys who might be experts upon any particular question to go into any district of the United States and conduct legal proceedings in behalf of the United States pursuant to an appointment from the Attorney-General. It was not passed in order to permit some stenographer who may have been admitted to the bar twenty years ago to be present in the grand jury room. The defendant submits that if the presence of Garnett in the grand jury room was lawful, then it was not lawful because of the statute quoted. That statute cannot be made to serve any such a purpose.

In many states court reporters get themselves admitted to the bar, but their ability as accurate stenographers, is not in any wise increased by reason of the existence of their admission certificates. If Garnett's presence in the grand jury room was lawful it was lawful independent of his admission to the bar.

It appears that this statute is being used as a device by means of which a person is allowed to be in the grand jury room for a purpose not intended by the section quoted. This has been said by courts construing it:

> "The question presented, then, is whether, under the guise of appointment of attorneys to conduct proceedings before the grand jury, professional stenographers, who, as in this case, have been admitted to a county bar, may lawfully be present in a grand jury room for the sole purpose of taking stenographic notes of the testimony. (685.)
>
> U. S. v. Phila. & R. Ry. Co., 221 Fed. 683.

It is an old principle of law that one cannot do indirectly that which he cannot do directly. If professional stenographers are authorized to be present in a grand jury room for the sole purpose of taking down the testimony of witnesses, then let it be so declared, but this declaration should not depend upon the fact that such stenographers have been at some time or other admitted to the bar and that they have been appointed by the Attorney-General to conduct proceedings as United States Attorneys.

The greatness of our Government, the frankness of our law and the open-mindedness of our courts will not permit of such indirect purposes on the part of either the plaintiff or of the defendants. Schemes, devices and subterfuges should never be permitted.

For these reasons the writer of this brief ignores a further consideration of this statute, as the Trial Court ignored it. Strain at that statute as you will, torture it as you like, and it does not mean that it authorizes either directly or indirectly the presence of a professional stenographer in the grand jury room for the sole purpose of taking down the testimony of the witnesses.

> U. S. v. Virginia-Carolina Chemical Co., 163 Fed. 66. (Decided by the Circuit Court of Tennessee, July 3, 1908).

In the case last cited District Judge McCall construes an alleged appointment similar to the one involved in the case at bar. He holds that the appointment did not make the persons named therein United States attorneys for the District of Tennessee. (Page 72.) He finally considers the effect of the Act of June 30, 1906, and he says:

> "Here we have Congress, after this indictment was found, enacting a law authorizing the Attorney General to do the very thing that was attempted to be done in this case; that is, appoint special assistants to the district attorneys to assist them in discharging their duties in grand jury proceedings. Mr. Gillett, of the House of Judiciary Committee, reported the bill from that committee, and therein said:
>
> 'As the law now stands, only the district attorney has any authority to appear before a grand jury, no matter how important the case may be, and no matter how necessary it may be to the interests of the government to have the assistance of one who is specially or particularly qualified by reason of his peculiar knowledge and skill, to properly present to the grand jury the question being considered by it.'
>
> He understood, and Congress understood, that at that time only the district attorneys had authority to

appear before a grand jury no matter how important the case may be."

In the case being considered by Judge McCall it appeared that Mr. E. T. Sanford and Mr. J. Harwood Graves were not citizens or residents of the middle district of Tennessee but were brought into that district to actually assist the district attorney. They were eminent lawyers and were specially skilled with reference to the case then being investigated. The Trial Court quashed the indictment on the ground of their presence because the Act of June 30, 1906, was not in effect at the time the indictment was found.

A reading of this case and a consideration of the statement of Mr. Gillette who presented the bill makes clear the purpose of the statute.

ORIGIN OF THE GRAND JURY.

The jury itself is a matter of growth in English law. In criminal matters it was used twice in the course of each action. The grand jury was the jury of accusation and the petty jury was for trial purposes. (Vol. 5 Continental Legal History Series, (Esmein) Page 323.) It was essential at the time of the adoption of the Constitution of the United States that the grand jury's proceedings should be secret and it was equally necessary that the secrecy of the proceedings should be protected inviolate and that such proceedings in determining whether an accusation should be made should be lawfully conducted. The right of the accused to the orderly and impartial administration of the law extends even to proceedings had before this jury of accusation.

Wilson v. State, 70 Miss. 595; 35 Am. St. 664.

The writer concedes that perhaps the California method, arising out of the Hurtado case is superior to the proceedings before this jury of accusation.

In the language of Mr. Circuit Judge Sanborn of the Eighth Circuit this California method is said to be, "The best protection against trial without a lawful accusation yet devised." (199 Fed. 32.) But the California method applies to states and is created by state constitutions and cannot be adopted for criminal cases under the law of the United States without an amendment to the Constitution of the United States. If the grand jury system is archaic and not in accord

with the progress of the times, then we should amend our constitution by the method prescribed for amendment, not by judicial construction. We should not attempt, by the latter means, to give to the prosecution many of the advantages to be obtained from the California method without opening up those advantages to the person being accused.

The grand jury and its proceedings should be taken, as they were, at the time the Constitution of the United States was adopted. The institution known as the grand jury cannot mean any different thing today than it meant in 1787.

This Court held, in U. S. v. Thompson: (Supra)

> "That the power and duty of the grand jury to investigate is original and complete, susceptible of being exercised upon its own motion and upon such knowledge as it may derive from any source which it may deem proper, and is not therefore dependent for its exertion upon the approval or disapproval of the court; that this power is continuous, and is therefore not exhausted or limited by adverse action taken by a grand jury or by its failure to act, and hence may thereafter be exerted as to the same instances by the same or a subsequent grand jury."

It is well settled that the selection of a grand jury is a matter of substance and cannot be disregarded without prejudice to the accused. It is also well settled that grand jurors may not be unlawfully interferred with during the investigation or deliberations without prejudice to the accused.

It is true that the district attorney may assist the grand jury to the extent of examining the witnesses and stating generally the law, but neither the district attorney nor any other person may improperly influence a grand jury. The district attorney may be present during the taking of the testimony, but neither he nor any other person may be present during the deliberations of the grand jury. This presence of the district attorney during the taking of the testimony or of his lawful assistants during that time is not for the purpose of aiding the Government in preparing its case for trial.

It is submitted that the grand jury room is not a mere preparation ground for either the prosecution or the de-

fense. The only reason the district attorney is allowed in the room at all is to aid the grand jury. According to the Government's brief one would come to the conclusion that the district attorney was, by the law, permitted to use the institution known as the grand jury for the purpose of compelling a complete disclosure of the witnesses called before the grand jury; not to aid the grand jury, but to aid the district attorney in preparing his case for trial before the petty jury. If this jury of accusation has no other force or function than to afford the district attorney an excellent opportunity for preparation of his case, then indeed should this old, honorable institution be abolished.

Mr. Holdsworth, in his late work upon English law, says that sometimes a principle, even though archaic, serves the function of preserving the liberty of the citizen. And one thing is certainly true that if professional stenographers may be put into the grand jury room by the prosecution, then it would be much better to open the grand jury room to the general public.

Prior to statehood in the Territory of Utah the Statute prohibited any person being present during the proceedings of the grand jury, except the members thereof, the interpreters and witnesses actually under examination.

The attorney for the people was allowed to be present for the purpose of interrogating the witnesses.

2 Compiled Laws of Utah, 1888, Section 4920.

> "The grand jury may, at all reasonable times, come into court and ask its advice on questions of law, but the judge must not be present in the jury room during the sessions of the grand jury. The attorney or attorneys for the people may at all times appear before the grand jury for the purpose of giving information or advice relative to any matter cognizable by them, and may interrogate witnesses before them whenever they or he think it necessary; but no other person is permitted to be present during the sessions of the grand jury except the members, interpreters and witnesses actually under examination, and no person must be permitted to be present during the expression

of their opinion or giving their votes upon any matter before them."

2 Compiled Laws of Utah 1888, Section 4921.

"Every member of the grand jury must keep secret whatever he himself or any other grand juror may have said, or in what manner he or any other grand juror may have voted on a matter before them; but may, however, be required by any court to disclose the testimony of a witness examined before the grand jury, for the purpose of ascertaining whether it is consistent with that given by the witness before the court, or to disclose the testimony given before them by any person upon a charge against such person for perjury in giving his testimony, or upon trial therefor."

2 Compiled Laws of Utah 1888, Section 4922.

"A grand juror cannot be questioned for anything he may say, or any vote he may give in the grand jury relative to a matter legally pending before the jury, except for perjury of which he may have been guilty, in making an accusation or giving testimony to his fellow jurors."

This section (4920) was carried into the state law of Utah and up until just a short time before the presentation of the matter involved in the case at bar that was the practice of the United States Court for the District of Utah. For this reason the case of Wilson v. U. S. (229 Fed. 344) does not apply, because, according to Mr. Circuit Judge Lacombe, there had been a long continued practice in the second circuit under which a stenographer had been permitted to be present.

If the question is to be determined by the practice in the particular district where the indictment is found, then the ruling of the Trial Court was in accord with that practice in the Utah District. The Trial Court could not be expected to ignore the practice of the Utah district and follow the practice of the New York District.

Ever since the trial of Lord Shaftesbury, 4 How. State Trials, 183, it has been the practice under English law that this jury of accusation should sit in secret and to justify the finding of an indictment the Grand Jury must be convinced, so far as the evidence goes, that the accused is guilty, or, in

other words, the Grand Jury is not to find an indictment unless in its judgment the evidence before it, unexplained and uncontradicted, would warrant a conviction by a petit jury.

See the Charge of Justice Field, 2 Sawyer, 673.
See also monographic note, 12 Am. St. 900.
State v. Bowman, 90 Me. 363; 60 Am. St. 266.

"We think that in the interests of justice, and in accordance with the principles of public policy, it is wiser to hold that this is a matter which may be taken advantage of by a respondent, than that, although improper and unauthorized, it cannot be made the subject of review.

"Another consideration should not be lost sight of. The object of an investigation by a grand jury is not only to bring the guilty to trial, but also to protect the innocent from groundless accusation. The duties of grand jurors are important and responsible. They should be entirely independent; they should be uninfluenced by any consideration except a desire to 'diligently inquire and true presentment make of all matters and things' given them in charge, according to their oaths and their consciences. If it be competent for the court to order a stenographer to be present and take stenographic notes of the testimony of witnesses for such future use as the court might order or the law allow, it might be done in one case only during a whole session, while all other matters were investigated in the ordinary way. Should that be done, we cannot tell what influence such a discrimination might have upon the jurors. We think that in some cases it might affect their independence, and impair the rights of the accused.

"Our conclusion is, that for the reasons given, the proceeding is unauthorized and improper and that the indictment so found is void."

State v. Bower, 183 N. W. 322; 191 Ia. 713.
decided by the Supreme Court of Iowa on June 21, 1921.

"The grand jury is a secret inquisitorial body. The oath administered to every witness called before it imposes an obligation never to reveal and always to

conceal all matters to which the attention of said witness may be called during his examination.

"It is quite apparent that to permit three witnesses, or any number of witnesses, to remain in the grand jury room during the investigation of a cause would eliminate all secrecy, would convert a strictly private hearing into a public investigation and in the instant case would permit the prosecuting witness to dominate the hearing and make all the testimony conform to his version of the affair. This would be very prejudicial to the rights of the defendant in the event an indictment was returned. Through such means the grand jury system would lose its historical significance as an inquisitorial body and the ancient landmarks which gave to that body its present constitution and functions would be destroyed."

If witnesses not under examination may not be present, then what may be said of the presence of a professional stenographer who makes a permanent record, ordinarily accepted as conclusively accurate, of everything that is said while he is present in the grand jury room?

Statutes in many states have been enacted authorizing the presence of a professional stenographer. The fact that such statutes have been enacted shows that without the statute the presence of a stenographer is unauthorized. The reasons for the secrecy relative to proceedings before grand juries are manifold. One is that the utmost freedom of disclosures of alleged crimes and offenses by prosecutors may be secured. A second is that perjury and subornation of perjury may be prevented. A third is to avoid the danger of escape by the person indicted. A transcript may encourage perjury as well as prevent it. It is a well known fact that many persons will adhere to false statements if there has been a record made of such statements, whereas, if no record has been made the same person will finally disclose the truth.

Grand Jury proceedings are carried on for the purpose of accusing the guilty but also for the purpose of protecting the innocent.

"The grand jury of modern times still retains some traces of antiquity which have been lost to the other varieties of the jury. They consider the ev-

idence in secret and the court does not control or advise them as to their findings in the individual cases which come before them. It merely charges them generally as to the nature of the business which they are about to consider."

1 Holdsworth's History of English Law, 322.

On Page 320 the author says:

"We shall see that many times in the history of English constitutional law the survival of archaic ideas has helped forward the cause of the liberty of the subject."

State v. Broughton, 7 Iredell's Law, 96; 45 Am. Dec. 507.

In this case the Supreme Court of North Carolina discusses the policy of the law and the secrecy of the Grand Jury.

In the case of Leatham v. United States, 141 C. C. A. 250;

Leatham v. United States, 141 C. C. A. 250; 226 Fed. 420; L. R. A. (N. S.) 1916 D.

the United States Circuit Court of Appeals for the Fifth Circuit fully discusses the question, and in the L. R. A. Report there is attached a monographic note which fully covers the ground. It is unnecessary to add anything to the reasoning of the Circuit Court of Appeals of the Fifth Circuit.

State v. Branch, 68 N. C. 186; 12 Am. Rep. 633.

In this case the judge of the Superior Court required the Grand Jury to have the witnesses on the part of the State examined publicly. It is submitted that this was less harmful than the method pursued in the instant case. The Supreme Court of North Carolina, speaking by Mr. Chief Justice Pearson, said:

"The power of the judge to require a grand jury to come into open court and have the witnesses for the State examined, is not only opposed to immemorial usage, but is not sustained either by principle or by authority.

"The province of a grand jury is not to try the party, but to inquire whether he ought to be put on

trial; and the purpose is, to save the citizen the trouble, expense and *the disgrace of being arraigned and tried in public on a criminal charge, unless there be sufficient cause for it.* To this end it is provided by the constitution: 'No person shall be put on trial, except upon a bill of indictment found by a grand jury.' This provision of the constitution was aimed at a prerogative of the crown, under pretense whereof a citizen could be put on trial upon a charge of a criminal offense, upon the information of the crown officer, whereby the good citizens were oftentimes exposed to the scandal and disgrace of being tried in public, when, in truth, there was no sufficient cause to suspect their guilt.

Thus it is seen that the purpose of this provision in the declaration of rights is to protect citizens from the scandal and disgrace of being arraigned and put on trial in public, unless there be sufficient ground for it.

"How does this innovation upon ancient usage comport with this clause of the declaration of rights? It defeats it in *toto.* If the man is to be exposed without inquiry as to the sufficiency of the evidence, to the scandal and disgrace of a trial in public, it may as well be done on the information of the State's solicitor; for the protection of a grand jury amounts to nothing if the citizen is to be frist exposed to scandal and disgrace by a public examination of the witnesses on the part of the State, in order to see whether he ought to be exposed to the scandal and disgrace of being tried in public on a criminal charge; and if, upon the public examination of the witnesses for the State, he has no right to cross-examine, and no right to offer witnesses to contradict the witnesses of the State, or to prove their bad character, and to be defended by counsel, it would be better for him to have a trial at once, upon information, where he has the right 'to confront the accusers and witnesses with other testimony and to have counsel for his defense', instead of being, in the first place, put in the condition of a victim tied to a stake, while his reputation is being tortured to death. (Italics in the opinion.)

It is submitted that this is another reason why the Grand Jury proceeds in secret. That jury of accusation was not created for the benefit of the Government. In the days prior to Magna Carta it served one function, but since 1215 and at the time of the adoption of the Constitution of the United States, the institution of the Grand Jury was for the protection of the citizen. It was an independent body authorized to inquire into all matters of a criminal nature. The Grand Jury was not supposed or authorized to reveal that which occurred in its presence. No written memorial was made of the testimony taken before it. The jurors were bound to true presentment make, but they were also bound not to find an accusation against anyone unless the evidence, if uncontradicted, would, in the opinion of the Grand Jurors, justify a conviction by a petit jury.

Until recently no one ever conceived of the idea that the Grand Jury room was a preparation ground for the District Attorney. Until recently no one ever thought that professional stenographers should be present and accurately take in shorthand every word that was uttered while the Grand Jury was making its investigation. The investigation was to be made and if no indictment was found, no cause for accusation found, then for reasons of public policy the whole matter was to be forgotten; but under present views and under the contentions made by the Government in the case at bar, it seems that a written memorial should be made; that it should be turned over to typists and to Government officials and that officers of the Government may disclose, even at public banquets, that which was testified to before the Grand Jury. District Judge Thompson refers to such a circumstance in the opinion to be found in 221 *Fed.* 687, for he says:

> "The appointment of a stenographer to take testimony under guise of an assistant district attorney to conduct proceedings is not without precedent in this district. The wisdom of permitting the testimony to be transcribed and to go into the possession of persons outside of the office of the district attorney may be seriously questioned, as instanced during an investigation within a few years in this district, where the statements of witnesses before the grand jury, having been taken down stenographically, were repeated by an officer of the government, who had not been present

in the grand jury room, but into whose posssession they had come, *at a public banquet.*" (Italics ours).

All the evils that a public hearing would entail are multiplied by a hearing secret in form but stenographically reported, so that a transcript can be made of the shorthand notes and so that such transcript, or its copies, may circulate here, there and yonder for time without end. The Government says in its brief that the weight of authority in the State Courts and the prevailing view in the lower Federal Courts justifies the practice. This defendant challenges that statement. Sound reason and good sense are decidedly against the practice, and wherever a State statute has authorized it, the legislature has been very particular to guard and limit the action of the stenographer. All of the States which have passed statutes authorizing such practice have recognized that the rule was otherwise in the absence of statute.

The case of Wilkes v. United States, 291 Fed. 988. is not in point. In that case the defendant pleaded to the merits and undertook to prevent the use of the transcript by objection, and also undertook to move his discharge because of the presence of the stenographer before the Grand Jury, and also undertook to move in arrest of judgment for the same reason. Of course, his objections and motions were overruled.

The case of Wilson v. United States, 229 Fed. 344. is based upon a practice existing in the New York Circuit for upwards of sixty years. See opinion of Mr. Circuit Judge LaCombe, Page 347.

The practice of the Utah Federal District ever since statehood, and the practice of the Utah Territorial Federal Court, never authorized the presence of a stenographer during the sessions of a Grand Jury. In at least one State it has been held that a statute authorizing the presence of a police officer was unconstitutional.

Opinion of Justices, 232 Mass. 601, 123 N. E. 100. The Supreme Judicial Court of Massachusetts said:

"The grand jury is an ancient institution. It always has been venerated and highly prized in this country. It has been regarded as the shield of in-

nocence against the plottings of private malice, as the defense of the weak against the oppression of political power, and as the guard of the liberties of the people against the encroachments of unfounded accusations from any source. These blessings accrue from the grand jury because its proceedings are secret and uninfluenced by the presence of those not officially and necessarily connected with it. It has been the practice for more than two hundred years for its investigations to be in private, except that the district attorney and his assistant are present. Secrecy is a vital requisite of grand jury procedure. It was said in the recent decision of Commonwealth v. Harris, 231 Mass. 584, at page 586, 121 N. E. 409, at page 410, quoting in part the words of Chief Justice Shaw in Jones v. Robbins, 8 Gray, 329, 344: 'The right of individual citizens to be secure from an open and public accusation of crime, and from the trouble, expense and anxiety of a public trial, before a probable cause is established by the presentment and indictment of a grand jury, in case of high offenses, is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions, and as one of the ancient immunities and privileges of English liberty.' The above quotation is a declaration and decision that the twelfth article of the Declaration of Rights in part was aimed and intended to prohibit the scandal and disgrace of a trial in public of persons charged with infamous crimes and offenses when, in truth, there was no sufficient cause to suspect their guilt. It is also a declaration that it shall no longer be possible for one or more judges to compel or direct the examination of a witness to be held in open court before the grand jury, should the judges seek to over-awe the latter or the witness by the presence of other witnesses or bystanders, or should he or they be of opinion the prosecution is too indulgently or too vindictively conducted.'

"These essential characteristics of the grand jury would be broken down if a police officer or other person who had investigated the evidence, interviewed the witnesses, and formulated a plan for prosecuting the accused should be permitted to be present during the hearing of testimony. This conclusion follows irresist-

ibly from the two decisions just cited, by which we are bound.

"There is no inherent necessity in the efficient conduct of investigation by the grand jury which justifies such invasion of their proceedings by strangers. The presence of a police officer cannot be justified upon such ground. Indeed the attendance of the district attorney and his assistant subserves every rational purpose which could be accomplished by the proposed bill. The attendance of a police officer would afford opportunity for subjecting witnesses to fear or intimidation, for preventing freedom of full disclosure by testimony, and for infringing the secrecy of the proceedings. Mere rules of procedure practiced by our ancestors at the time of the adoption of the Constitution did not become an inherent part of due process. But no change 'can be made which disregards those fundamental principles, to be ascertained from time to time by judicial action, which have relation to process of law and protect the citizen in his private right, and guard him against the arbitrary action of government.' Twining v. New Jersey, 211 U. S. 78, 101, 29 Sup. Ct. 14, 20 (53 L. Ed. 97)."

One might says that the presence of a police officer would tend to prevent perjury and that it could be presumed that a police officer would not violate the law, but we know as a matter of fact that many public officers, even to judges upon the bench, sometimes use their positions for the purpose of punishing their enemies and rewarding their friends.

The king could do no wrong and yet the creation of this grand jury institution was brought about in order that the subject might have protection from the aggressions of the crown. It is one of the bulwarks of liberty and its ancient landmarks should either be preserved or the Constitution amended and the California system approved in the Hurtado case should be adopted.

Defendant has already cited in his motion to dismiss the cases upon which he relied. As far as the Arkansas case is concerned, cited by the Government, little need be said of it, because it is in direct contravention of the statute of the State of Arkansas.

MISCONDUCT OF DISTRICT ATTORNEY.

It appears from the record, if we are to consider the bill of exceptions, that the eminent District Attorney had concluded the examination of witnesses and then made a short presentation, or, in the language of the witness, a brief resume' of the salient points of the testimony that had been offered. This was done at the request of the Grand Jurors (R. 35). This defendant contends that this brief resume' of the salient points was misconduct, justifying the quashing of the indictment. If the District Attorney could lawfully make a short argument, then he could lawfully make a more extensive and even more ardent one. The Grand Jury room is no place for argument by the District Attorney. It would have been much better to have permitted the Court to have sat with the Grand Jury and then summed up the evidence and charged the jury and expressed his opinion as to the credibility of the witnesses, because it can always be assumed that the presiding judge would be less ardent and less of an advocate than would be the District Attorney whose duty it is to prosecute rather than to preside.

> Commonwealth v. Harris, 231 Mass. 584; 121 N. E. 409
>
> Attorney General v. Pelletier, 240 Mass. 624; 134 N. E. 407.

And again, this record shows that after the District Attorney had given this brief resume' of the salient points and after the Grand Jury had deliberated for some time upon the guilt or innocence of the defendants, and after they had been weighing the evidence by mutual discussion and examination, the District Attorney once more appeared in the Grand Jury room, at the request of some of the Grand Jurors. The District Attorney was asked whether or not it would be possible for an indictment to be rendered against some of the defendants and not the others. (R. 36.)

> "He replied that it would be impossible to segregate the defendants; that if an indictment was brought it would have to be brought against all of them or not any." (R. 36.)

This witness was cross-examined by the District Attorney, Mr. Morris, and this statement quoted was in no wise

shaken by the cross-examination. On cross-examination, the witness said:

> "Mr. Morris made this statement that after we had asked him whether or not it would be possible to render an indictment against some of the defendants and not all he said that an indictment, if brought, would have to include all of the defendants and they could not be segregated." (R. 36.)

In the brief of the Government we find this statement:

> "According to the memory of the only grand juror who testified, when the District Attorney was asked by the Grand Jury, he expressed the opinion that all of the defendants should be indicted or none." (Government Brief P. 14.)

It will be of little avail for counsel for the Government to undertake in any wise to minimize the positive statement of the witness as it is set-forth in the record. Of course, he testified from memory. He spoke out of his recollection, but when the testimony is read from the record one does not get the impression he might derive from reading the quotation just taken from the Government's brief. That quotation indicates that the witness was uncertain. The record shows that he was certain as any witness ever could have been, and the record shows that neither Mr. Morris nor any other witness in any wise disputed the testimony given by the Grand Juror Wilcox. Mr. Morris was the District Attorney. Mr. Morris could have taken the stand and disputed the statement of Wilcox, and when the District Attorney did not do that, everyone must presume that the testimony of Wilcox was true and treat it as conclusive.

No authority has been cited by the Government which justifies in any respect the statement made by the District Attorney to the Grand Jurors that all must be indicted or none. The fact that the Grand Jurors asked the question of the District Attorney implies that the Grand Jurors had concluded that one or more of the defendants should not be indicted. It also implies that after receiving the answer of the District Attorney, they indicted someone whom they believed to be innocent in order to catch someone whom they believed to be guilty. This is subjecting the innocent person to a

wrongful accusation in order to make a proper accusation against a guilty one.

Commonwealth v. McNary, 140 N. E. 255
United States v. Wells, 163 Fed. 313.

(Decided by the United States District Court for the District of Idaho.) In that case Mr. District Judge Whitson quoted from Mr. Justice Field in his famous charge to the Grand Jury to the effect:

> "The District Attorney has the right to be present at the taking of testimony before you for the purpose of giving information or advice touching any matter cognizable by you, and may interrogate witnesses before you, but he has no right to be present pending your deliberations on the evidence."

In the case at bar the District Attorney came into the middle of the deliberations of the Grand Jury and it may be assumed from the state of the record that the District Attorney materially influenced the deliberations of this Grand Jury.

20 Cyc. 1338.

> "But he cannot participate in the deliberations, or express opinions on questions of fact or as to the weight and sufficiency of evidence, or attempt in any way to influence the finding."

If the district attorney is to be permitted to do that which is conclusively shown in this record, then how can his conduct be differentiated from the most violent and flagrant denunciation or the most partisan argument made by any district attorney in the future. If one district attorney, even though acting in good faith, can argue a cause before a grand jury, then every district attorney may argue. If one district attorney may insist that if any one of four men is to be indicted, then the indictment must be against the entire four, what is to prevent the indictment of many innocent persons for the sole purpose of indicting a few guilty ones?

At one time it was thought that it was better for nine guilty to escape than for one innocent man to be convicted, but the theory seems to have been reversed in the procuring of this indictment, and, according to the instructions given

by the district attorney to this grand jury, the indictment of innocent persons was required in order that the indictment of guilty persons might be had.

It is conceivable that some, or all, of these four defendants may be either guilty or innocent. It is, likewise, conceivable that there may be different degrees of guilt, and that some of them may be guilty and others innocent.

Counsel for the Government in its brief says: (P. 14.)

> "The statement of the district attorney could only have meant that if the evidence involved some of the defendants in the conspiracy or substantive offenses, it involved them all."

We do not see how the district attorney could have meant or intended to convey any such thought as is contained in the above quotation, but we do say that even if the district attorney meant that if the evidence involved some of the defendants in the conspiracy or substantive offenses it involved them all, still, such a statement would have been misconduct of the grossest character. The conduct of four men is the subject for investigation on a charge of conspiracy. Two of them may be guilty of conspiracy but it does not necessarily follow that because the evidence involves two of them that it necessarily involves them all.

If it had been the opinion of the district attorney that the evidence involved all of them he had no right to give that opinion to the grand jury and the grand jury had no right to act upon it.

Even though this court might say from the evidence taken before the grand jury, if that evidence were before this court, that it justified an indictment against all of the defendants, still the conduct of the district attorney in expressing such an opinion to the grand jury would have been improper and unlawful because that would be substituting the opinion of the district attorney for the opinion of the grand jury. Even this court would not have a right to substitute its opinion for the opinion of the grand jury. Neither the district attorney nor any court may indict. That is the function of the grand jury and under the Constitution of the United States, it is submitted, that that function must remain protected inviolate until some other method of accusation is provided

by proper amendment of the Constitution of the United States.

For these reasons it is respectfully submitted:

FIRST. That the writ of error shall be dismissed because it is not authorized by any law of the United States.

SECOND. Because said writ of error, even though authorized by law, was not taken within time.

THIRD. Because it was not prosecuted with due diligence, even though authorized and taken within time, as required by the Act of March 2, 1907.

If this court shall find these matters against this defendant then, it is submitted, that the decision of the Trial Court must be affirmed on any one of three grounds: The presence of the stenographer in the grand jury room was unlawful and unauthorized. The conduct of the district attorney in summing up the testimony before the grand jury was contrary to law. And lastly, the deliberations of the grand jury were unlawfully interfered with by the district attorney; the latter instructing said grand jury that they must indict all of the defendants if they indicted any.

Respectfully submitted,

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DAN B. SHIELDS,
ALBERT R. BARNES.

Attorneys for Defendant
in Error
Charles M. Croft

SUPREME COURT OF THE UNITED STATES.

No. 95.—October Term, 1926.

The United States of America, Plaintiff in Error, *vs.* George A. Storrs, Joseph S. Welch, et al.	In Error to the District Court of the United States for the District of Utah.

[December 13, 1926.]

Mr. Justice Holmes delivered the opinion of the Court.

The defendants in error were indicted for conspiracy to violate and violation of § 215 of the Penal Code, punishing use of the mails for the purpose of executing a scheme to defraud. They pleaded in abatement that when the grand jurors were investigating the charge the official court stenographer was present and took down the evidence; that the district attorney was also present and undertook to give a summary of the evidence to the grand jurors, and that he advised them that any indictment, if found, must be against all the defendants named. On these grounds it was prayed that the indictment be abated and that the defendants should not be required to answer the same. The District Court overruled a demurrer, sustained the plea on the evidence and entered judgment that the indictment be abated. It is certified in the record that when the judgment was entered the statute of limitations had run and that therefore the United States will be barred from further prosecution of the defendants. The United States brings this writ of error on the ground that in these circumstances the plea was in substance a 'special plea in bar' within the meaning of the Criminal Appeals Act of March 2, 1907; c. 2564; 34 St. 1246.

It is true that there is less strictness now in dealing with a plea in abatement than there was a hundred years ago. The question is less what it is called than what it is. But while the quality of an act depends upon its circumstances the quality of the plea de-

pends upon its contents. As was said at the argument, it cannot be that a plea filed a week earlier is what it purports to be, and in its character is, but a week later becomes a plea in bar because of the extrinsic circumstance that the statute of limitations has run. The plea looks only to abating the indictment not to barring the action. It has no greater effect in any circumstances. If another indictment cannot be brought, that is not because of the judgment on the plea, but is an independent result of a fact having no relation to the plea and working equally whether there was a previous indictment or not.—The statute uses technical words, 'a special plea in bar' and we see no reason for not taking them in their technical sense. This plea is not a plea in bar and the statute does not cover the case.

The Government bases its argument upon *United States* v. *Thompson*, 251 U. S. 407. In that case an indictment was quashed by the trial Court upon motion on the ground that the same counts had been submitted to a previous grand jury and no presentment had been made, and that they could not be submitted to a second grand jury without leave of Court, which had not been obtained. It so happened that a further prosecution upon these counts would be barred by the statute of limitations, although other counts had been presented in the first case upon which a trial still might be had. This Court held that the motion to quash amounted to a plea in bar since the facts alleged barred any later proceeding by the United States, according to the law laid down by the trial Court, except upon a condition that was held by this Court to be improperly imposed. Perhaps the decision went to the extreme point, but it was put on the contents of the plea seen in the light of the law applied, not on the fact that the statute of limitations had run. It was said that the United States had the right to present and the grand jury had the right to entertain the charges without leave of court and that the necessary effect of this judgment 'was to bar the absolute right of the United States to prosecute by subjecting the exercise of that right, not only as to this indictment but as to all subsequent ones for the same offenses, to a limitation resulting from the exercise of the judicial power upon which the judgment was based.' 251 U. S. 912. It was added that the same was true as to the authority of the district attorney

and the powers of the grand jury 'since the exercise in both cases of lawful authority was barred by the application of unauthorized judicial discretion.' We are of opinion that this decision interposes no obstacle to what seems to us the natural interpretation of the law.

Writ of error dismissed.

A true copy.

Test:

Clerk, Supreme Court. U. S.